

No. 89-699

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

COLORADO DEPARTMENT OF REVENUE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether under 21 U.S.C. 881(a) (1976 Supp. V 1981), proceeds of a narcotics transaction were forfeited to the United States as of the date of the act giving rise to forfeiture, thereby defeating the State's subsequent claim against those funds to satisfy the wrongdoer's unpaid state taxes.



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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 873 F.2d 242. The opinion of the district court (Pet. App. 16-44) is reported at 636 F. Supp. 1312.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1989, and a petition for rehearing was denied on August 2, 1989. Pet. App. 45-46. The petition for a writ of certiorari was filed on October 30, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 21, 1982, police officers in Lakewood, Colorado, who were investigating drug trafficking, executed

a warrant for the search of a house owned by Albert and Victoria Levy. In the course of the search they seized 12 gold bars and approximately \$1.5 million in currency. It is undisputed that the gold and currency were the proceeds of a cocaine transaction. Pet. App. 3, 19.

On December 2, 1982, the State of Colorado, through the local district attorney, commenced a nuisance action in state court under state law seeking forfeiture of the currency.¹ Thereafter, on December 22, 1982, the State of Colorado, through petitioner Department of Revenue, assessed taxes totalling approximately \$194,000 against Albert Levy based on narcotics sales of almost \$3 million in 1982. Those assessments were in the amounts of \$115,880 for state sales taxes, \$58,677 for state income taxes, and \$19,313 for Regional Transportation District (RTD) taxes. On December 23, 1982, a notice of lien for the state taxes and warrant of distraint were filed in state court, and on the same date, the state court entered judgment in petitioner's favor for \$194,000 in state taxes. Pet. App. 3-4, 20, 21.

Also on December 23, 1982, the United States filed a civil forfeiture action against the currency in the United States District Court for the District of Colorado, pursuant to 21 U.S.C. 881(a)(6) (1976 Supp. V 1981).² On January 3, 1983, the district court issued a warrant for arrest of the currency. On January 5, 1983, the Internal Revenue Service assessed a tax liability of \$1,962,563 against Albert Levy, pursuant to 26 U.S.C. 6851(a), and notices of federal tax liens against all property of Albert Levy were filed on

¹ The state nuisance action was dismissed on January 14, 1983, refiled on January 26, 1983, and dismissed again on May 29, 1984. Pet. App. 35.

² Section 881(a)(6), providing for forfeiture of all property furnished or intended to be furnished in exchange for a controlled substance, was enacted in 1978. See Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 301(a), 92 Stat. 3777.

January 24 and 25, 1983. The United States filed a civil forfeiture action against the gold bars on March 11, 1983, and the district court issued a warrant for the seizure of the gold bars on March 14, 1983. The clerk of the district court was appointed custodian of the currency and gold bars on March 25, 1983. Pet. App. 4, 21-23.³

In the civil forfeiture proceedings brought by the United States, claims were also filed against the res by other parties, including the IRS and the State of Colorado. The State's claims against the currency were based both on its pending forfeiture action under state law and on its claim (through petitioner Department of Revenue) for unpaid state taxes. The United States asserted (1) that under Section 881, forfeiture of the currency and gold bars to the United States took place upon the occurrence of the acts giving rise to forfeiture, and that the Levys thereafter retained no interest in the property that could be the subject of petitioner's (or the IRS's) tax assessments; and (2) that, in the alternative, the federal government's claims for unpaid federal income taxes took precedence over all other claims except those of petitioner. Pet. App. 24-25.

The district court rejected the United States' claim of paramount title to the currency under Section 881, concluding that forfeiture to the United States would become effective only upon entry of a judgment of forfeiture, which would not relate back to the commission of the underlying offense. Pet. App. 37-38. The court accordingly ordered that the res be allocated to satisfy the state and federal tax claims. In this regard, the court sustained petitioner's claim for state income taxes but rejected its claim for sales and RTD taxes,

³ On January 26, 1984, Albert Levy pleaded guilty to one count of conspiracy to defraud the United States by evading and defeating the collection of taxes on the income derived from illegal distribution of cocaine, in violation of 18 U.S.C. 371. Pet. App. 23.

explaining that the latter taxes may be assessed only on retail transactions and there was no evidence here that the transactions were anything other than wholesale. *Id.* at 38-39. The court held that the balance of the res should be allocated in partial satisfaction of the Levys' unpaid federal taxes, concluding that the federal tax lien took priority over the State's claim based on forfeiture under state nuisance law — especially since that claim was dismissed by the state court on May 29, 1984. *Id.* at 29-37; see note 1, *supra*.⁴

⁴ The State did not appeal the district court's rejection of the State's claim, through the district attorney, based on forfeiture under state law. The court of appeals would have had no occasion to address that issue in any event, because the court of appeals sustained the United States' claim based on forfeiture of the property as of the date of the commission of the act giving rise to forfeiture, which was prior to the State's seizure of the currency (the triggering date for forfeiture under state law). See page 5, *infra*. For this reason, no issue concerning the priority of any claims based on the possibility of forfeiture under state nuisance law is properly presented in this Court by petitioner Department of Revenue.

In addressing the state-law forfeiture claim, the district court recognized (Pet. App. 29-32) that the Colorado Supreme Court had ruled, in response to a question certified to it by the federal district court in another case (*United States v. Wilkinson*, 628 F. Supp. 29 (D. Colo. 1985)), that under Colorado law, the State's interest in property under the nuisance law vests upon seizure of the property, that a final order of forfeiture in a nuisance action relates back to the time of seizure, and that an individual therefore retains no interest in the property after the seizure. *In re Interrogatories of the U.S. District Court: United States v. Wilkinson*, 686 P.2d 790 (Colo. 1984). But the district court reasoned in the instant case that the individual does not lose all rights to seized property immediately upon seizure, since the state court might not order the property forfeited, and the United States' tax lien therefore may attach during the period prior to judgment. For this reason, and in light of the priority of federal tax liens under the Supremacy Clause, the court held that the federal tax lien is entitled to priority over the State's forfeiture claim. Pet. App. 34-37. The Tenth Circuit subsequently sustained this view of the interaction of state forfeiture law and federal tax law in *United States v. Wingfield*, 822 F.2d 1466, 1472-1475 (1987), cert. dismissed, 486 U.S. 1019 (1988), which was a companion case to

2. The United States appealed the district court's order insofar as it declined to order forfeiture of all the property to the United States under Section 881. The court of appeals reversed the judgment of the district court and remanded with directions to enter an order of forfeiture in favor of the United States. Pet. App. 1-15.⁵ The court of appeals held that under 21 U.S.C. 881(a)(6) (1976 Supp. V 1981), the United States' right to the proceeds of drug trafficking vested at the time the unlawful act was committed, and a judgment of forfeiture therefore related back to the commission of the offense. Pet. App. 7-13. As a result, the court concluded that the title obtained by the United States under the civil forfeiture statute defeated the competing claims to the property. *Id.* at 15.⁶

Wilkinson and which was also discussed by the district court in the instant case. See Pet. App. 32-34.

⁵ The district court had not entered a final judgment on the United States' forfeiture claim, presumably because, after satisfaction of the state and federal tax liens, none of the res remained to be ordered forfeited to the United States. Based on the stipulated facts establishing the United States' entitlement to the property, the court of appeals saw no reason why an order of forfeiture should not be entered. Pet. App. 15.

⁶ Petitioner also argued that it was an "innocent owner," under 21 U.S.C. 881(a)(6) (1976 Supp. V 1981), of the portion of the proceeds of Levy's drug sales that would be used to satisfy the State's lien for sales taxes, because, under state law, Levy held that portion in trust for the State. The court of appeals rejected this argument, reasoning that because Section 881(a)(6) provided for forfeiture of all property "furnished or intended to be furnished by any person in exchange for a controlled substance," the property was forfeited to the United States while it was still in the hands of the purchaser, when the purchaser manifested an intent to exchange it for the cocaine. Pet. App. 14. Because the property subject to the state sales tax lien therefore was not exempt from forfeiture, the court of appeals had no need to address petitioner's argument, raised in its cross-appeal, that the district court erred in requiring petitioner to show that the drug sales involved were retail, not wholesale, in nature. *Ibid.* Petitioner does not renew that argument here. See Pet. i.

Court of Appeals for the Tenth Circuit reversed the Order of the district court, and held that the DEA's 21 U.S.C. § 881 claim took priority over all other claimants. The Tenth Circuit reasoned that 21 U.S.C. § 881(a)(6) (1979) was a mandatory forfeiture and DEA's title in the illegally obtained property related back to the time of the offense(s). Appendix A at page 12.

On October 20, 1989, the district court ordered the property released to the federal government.

REASONS FOR GRANTING THE PETITION

Review by this court is sought because the Tenth Circuit's opinion: (a) incorrectly applies in one instance, and wholly ignores in another instance, pertinent decisions of this court; (b) conflicts with cases from other circuits and a state supreme court; and (c) detrimentally affects federal-state relations on a vital question relating to the state's ability to sustain its own government. *See* Sup. Ct. R. 17(a)(1).

In deciding that 21 U.S.C. § 881(a)(6) (1979) was "mandatory," rather than "permissive" in nature, the Tenth Circuit relied upon *United States v. Stowell*, 133 U.S.

(Continued from previous page)

acquiescence, laches, or failure to act." *United States v. California*, 332 U.S. 19, 40 (1947); *see also California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 276 n.4 (1982). In *United States v. Wingfield*, 822 F.2d 1466, 1476 n.8 (10th Cir. 1987), the Tenth Circuit stated what appears to be the consistent view across the country "that it is very clear that where federal taxes are due, particularly where they are due as a result of obtaining moneys or profits from a criminal enterprise, the United States government (IRS) is not free to waive its rights to funds."

1 (1899). In *Stowell*, this court considered the language of the Internal Revenue statute section 3305 which state specifically that "upon the commission of certain acts," property shall be forfeited. This court concluded from this language that the IRS statute § 3305 created a mandatory forfeiture which gave the federal agency title to the property as of the time of the alleged event itself.

In the *Stowell* forfeiture case, there was nothing in the statute to indicate that the forfeiture was intended to be postponed. The language 21 U.S.C. § 881(a)(6) (1979) (*i.e.*, property "shall be subject to forfeiture"), however, provides only for a possibility of subsequent forfeiture and therefore the forfeiture is postponed until the court rules on the forfeiture. Because the forfeiture is based on a possibility, the relation back doctrine as outlined in *Stowell* would not be applicable. See *United States v. Thirteen Thousand Dollars in U.S. Currency*, 733 F.2d 581, 584 (8th Cir. 1984); *United States of America v. \$319,820 in United States Currency*, 634 F. Supp. 700 (N.D. Ga. 1986); and *United States v. Currency Totalling \$48,318.08*, 609 F.2d 210, 213 (5th Cir. 1980).

Had Congress intended that 21 U.S.C. § 881(a)(6) forfeitures to be mandatory, take priority over tax liens, and to limit the state's and Internal Revenue Service's power of taxation in relation to the forfeiture statutes, the language would not have been placed in the statute "*that property shall be subjected to forfeiture.*" Congress could have easily included the words "*property shall be forfeited*" and then there would be no question as to the priority of tax liens, *e.g.*, compare section 3305 of the Internal Revenue statutes. However, because Congress did not choose this language, it was improper for the Tenth Circuit to

modify or attempt to extinguish the State's rights to property that is clearly within its boundaries and subject to taxation. *Kirtland v. Hotchkiss*, 100 U.S. 491 (1879).

There is evidence that Congress has given its consent for a seizure pursuant to 21 U.S.C. § 881(a)(6) to take priority over a federal or state tax lien. The taxing power of the federal government is paramount and found in the constitution. *Michigan v. United States of America*, 317 U.S. 338, 340 (1943). The courts have held that the Internal Revenue Service can levy against funds held by *anyone*, including DEA. *Field v. United States*, 263 F.2d 758, 763 (5th Cir. 1959), *cert. denied*, 360 U.S. 918 (1959); *United Sand and Gravel Contractors v. United States*, 624 F.2d 733, 734, 736-37 (5th Cir. 1980). *Expoimpe v. U.S.*, 609 F. Supp. 1098 (D. Fla. 1985). *Cf. United States v. Wingfield*, 822 F.2d 1466, 1475 (10th Cir. 1987) (Internal Revenue Service could levy against local law enforcement while order of forfeiture was pending in state court).

Congress can, and has, given its consent for perfected and specific state tax liens to take priority even over a federal tax lien, if the state's tax lien was filed first in time and is choate. *United States v. City of New Britain*, 347 U.S. 81, 86 (1954). The Tenth Circuit Court of Appeals' decision wholly ignores this court's *City of New Britain* holding; however, by deciding that a 21 U.S.C. § 881(a)(6) forfeiture takes priority over tax liens, even if no order of forfeiture has been entered by the court, even if the tax liens were filed prior to the forfeiture action, and even if the tax liens are choate.

The Tenth Circuit's attempt to limit the state's power of taxation is in direct conflict with the Sixth Circuit

Court of Appeals, which has recognized the state's power to levy and seize funds held by DEA. In *United States v. Francis*, 646 F.2d 251, 263 (6th Cir. 1981), the court stated:

It makes no difference that in this case it is a *state* rather than Internal Revenue Service which has asserted an interest in the seized cash. The State of Michigan may validly levy on money owned by defendant and in the possession of the government (Drug Enforcement Agency).

Similarly, the Colorado Supreme Court has held that when property is seized under state law there remains an interest in the property which is subject to seizure until an order of forfeiture is entered. *United States v. Wilkinson (In re Interrogatories of the U.S. District Court)*, 686 P.2d 790, 790-91 (Colo. 1984). The property in question was seized under state laws by the Lakewood police. Appendix B at page 19. The Colorado Supreme Court has held, and the Tenth Circuit had previously agreed, that while a forfeiture action is pending under state law the owner retains some interest in the property which is subject to seizure even though he might not have the right to possession. See *United States v. Wingfield, supra*, 822 F.2d 1466 (Tenth Circuit sustains an Internal Revenue Service levy pending an order of forfeiture). As the property was pending an order of forfeiture, the state had a right to levy even against DEA.

The *new* Tenth Circuit view as outlined in this case, has now held that taxes are secondary to the forfeiture statute; in effect, that Internal Revenue Service can waive its rights to funds; and the state and Internal Revenue Service cannot levy against funds that are subject to and not even reduced to an order of forfeiture. It has granted

DEA an immediate right to the property, even where it has not obtained the necessary order of forfeiture from a court as Congress required. The Tenth Circuit's opinion has judicially created an automatic right of priority for DEA on seized property that was not intended or created by Congress with the enactment of 21 U.S.C. § 881(a)(6)

The Tenth Circuit's decision here has created a lack of uniformity and conflict in the circuits that must be resolved by this court. This conflict has a tremendous financial impact and creates disparate treatment of the states located in Sixth, Eighth and Tenth Circuits. States outside of the Tenth Circuit are allowed to continue in their taxation of drug money, while states inside the circuit are restricted from taxing property within their boundaries to their detriment. *See Kirtland v. Hotchkiss, supra.*

The State's right of taxation is an important right. The power of taxation is an incident to sovereignty, and belongs to the legislative department to determine the persons and objects to be taxed subject to constitutional limitations, and to provide the necessary mode and provisions for making the law effective. *Lawrence v. State Tax Commission*, 286 U.S. 276 (1932), *Board of Commrs v. Rocky Mt. News Printing Co.*, 15 Colo. App. 189, 61 P. 494 (1900). Except as inhibited by the supremacy clause of the federal constitution (see article VI of the United States Constitution) the state has unlimited power of taxation; it may set the rate, the objects, and may tax its own citizens for the pursuit of any particular business. *Kirtland v. Hotchkiss, supra*; *Michigan C.R. Co. v. Powers*, 201 U.S. 245 (1906); *Parsons v. People*, 32 Colo. 221, 76 P. 666 (1904). The State of Colorado has met the *City of New Britain, supra*,

standards of choateness because its tax liens were filed first, and because the identity of the lienor, the property subject to the lien, and the amount of the liens were established. The Tenth Circuit's opinion interpreting 21 U.S.C. § 881(a)(6) forfeiture as mandatory denies Colorado and other states in the Tenth Circuit revenues to which they are entitled.

This Court should grant certiorari to review the Tenth Circuit's decision here, because it is contrary to decisions of this court and other Courts of Appeals, and because it involves a serious dispute between federal and state entities concerning a matter vital to the state's ability to sustain itself, *i.e.*, its taxing power. Forfeiture law is becoming an increasingly burgeoning area of litigation, *see, e.g., United States v. \$41,305.00 in Currency & Travelers Checks*, 802 F.2d 1339, 1346 (11th Cir. 1986); and, authoritative treatment by this court is necessary to resolve the federal-state dispute in these important areas of the law.

CONCLUSION

For the foregoing reasons this court should issue a writ of certiorari to review the decision of the Tenth Circuit Court of Appeals.

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

PETER M. EGGLESTON,)	
Plaintiff,)	
v.)	
THE STATE OF COLORADO,	)	Nos. 86-2151
et al.	)	86-2192
Defendants-Cross-Appellees/)	
Cross-Appellants.)	

UNITED STATES OF AMERICA,)
Plaintiff-Appellant/)
Cross-Appellee,)
v.)
\$1,508,440.00 IN UNITED STATES)
CURRENCY,)
Defendant.)

UNITED STATES OF AMERICA,)
Plaintiff,)
v.)
TWELVE GOLD BARS,)
Defendants.)
)
)

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. Nos. 82-K-2144, 82-K-2228, 83-K-403)
(Filed Apr. 21, 1989)

F. Joseph Mackey, III (Robert N. Miller, United States Attorney, District of Colorado, with him on the briefs), Assistant United States Attorney, Mountain States Drug Task Force, for Plaintiff-Appellant.

Larry A. Williams (Duane Woodard, Attorney General, Charles B. Howe, Deputy Attorney General, and Richard H. Forman, Solicitor General, with him on the briefs), First Assistant Attorney General, General Legal Services Section, Colorado Department of Revenue, for Defendants-Appellees.

Before **TACHA**, and **SETH**, Circuit Judges, and **SAFFELS**, District Judge.*

TACHA, Circuit Judge.

This appeal arises from a dispute between state and federal agencies over property seized by law enforcement officials as proceeds of illegal drug trafficking. The federal Drug Enforcement Administration (DEA), the Internal Revenue Service (IRS), the Colorado Department of Revenue, and several other parties each claimed an interest in the property. The district court held that the Colorado Department of Revenue's lien for income taxes had priority over all claims and ordered the remainder of the

* Honorable Dale E. Saffels, United States District Judge for the District of Kansas, sitting by designation.

property to be applied in partial satisfaction of a federal income tax lien, denying all other claims. We reverse and remand.

I.

This case was tried upon stipulated facts that are set out in detail in the district court's opinion, *Eggleston v. Colorado*, 636 F. Supp. 1312 (D. Colo. 1986). We therefore do not repeat them here, except for the following background facts necessary for our decision.

On November 21, 1982, Lakewood, Colorado police seized twelve one-ounce gold bars and approximately \$1.5 million in cash from the home of Victoria and Albert Levy. *Id.* at 1316. This property was the proceeds of illegal drug transactions. *Id.* Soon after this seizure, several parties claimed an interest in the property and began maneuvering to establish the priority of their claims. *Id.* at 1316-17. The claims of all interested parties were consolidated for trial before the district court. *Id.* at 1314-15. Most pertinent to this appeal are the claims of the Colorado Department of Revenue, the IRS, and the DEA.¹

The Colorado Department of Revenue prepared sales, income, and Regional Transportation District (RTD) tax assessments against Albert Levy on December 22, 1982.

¹ Other parties also claimed an interest in the property, including a bank, Albert Levy, Victoria Levy, the State of Colorado, and the trustee of a trust to which Albert Levy had assigned all of his interest in the property for the purpose of paying any federal income tax liability. *Eggleston v. Colorado*, 636 F. Supp. 1312, 1319 (D. Colo. 1986).

Id. at 1317. Notices of tax lien and garnishment under distraint for collection were filed, and the Arapahoe County district court entered judgment in favor of the Department on December 23, 1982, as follows: Colorado sales tax - \$115,880.12; Colorado income tax - \$58,677.00; and RTD sales tax - \$19,313.39. *Id.*

On January 5, 1982, the IRS assessed a tax liability of \$1,962,563 against Albert Levy pursuant to its power under 26 U.S.C. § 6851(a). *Eggleston*, 636 F. Supp. at 1317, 1319. Levy received notice of the assessment and demand for payment, but failed to pay the assessment. *Id.* at 1319. A lien therefore arose by operation of law on January 5, 1982. *Id.* (citing 26 U.S.C. §§ 6321, 6322).

Finally, the DEA claimed the property under the civil forfeiture provisions of 21 U.S.C. § 881(a)(6). *Eggleston*, 636 F. Supp. at 1318. Although the Government had not yet obtained a judgment of forfeiture and did not file a claim for forfeiture until after the state and federal tax liens had been filed, the DEA argued that forfeiture relates back to the moment of illegal use of the property, thereby vesting title to the property in the federal government as of that moment and preventing the attachment of all liens arising subsequent to the moment of illegal use. *Id.*

Applying settled principles of priority, the district court denied the claims of all parties other than the DEA, the IRS, and the Colorado Department of Revenue. The court held that because the state and federal tax liens were clearly established before the other claims had been filed, or had become choate, those other claims were inferior to the tax liens. *Id.* at 1319-20 (citing *United States*

v. New Britain, 347 U.S. 81, 84, 85 (1954)). Furthermore, the amount of the tax liens clearly exceeded the value of the seized property, making a decision as to the validity and priority of the inferior claims unnecessary.

The critical issues before the district court therefore concerned the validity of the state tax liens and the priority among the claims of the DEA, the IRS, and the Colorado Department of Revenue. The district court upheld the validity of the state income tax lien, but denied the validity of the Colorado Department of Revenue's state sales tax and RTD sales tax claims. *Id.* at 1324. The district court decided that, under Colorado law, state sales and RTD taxes can be imposed only if the underlying sales can be construed as retail, rather than wholesale, transactions. *Id.* (citing Colo. Rev. Stat. § 39-26-104(1)(a) (1982)). The court, therefore, held that the sales tax liens in this case were invalid because the Department had failed to produce evidence indicating that the underlying drug sales had been retail sales. *Id.*

Regarding priority, the state income tax lien was held to be superior to the federal tax lien because it was filed first. *Id.* at 1324-25. The IRS conceded that the state income tax lien was filed first, but argued along with the DEA that forfeiture to the federal government under 21 U.S.C. § 881 should prevail over all tax liens because such forfeiture related back to the time of the offense. *Eggleston*, 636 F. Supp. at 1318.

The district court rejected the DEA's forfeiture claim, holding that forfeiture did not relate back to the time of the offense because 21 U.S.C. § 881 is a permissive, rather than a mandatory, forfeiture provision. *Eggleston*, 636 F.

Supp. at 1323-24. Accordingly, the DEA's claim for forfeiture could vest only when the judgment of forfeiture has been entered, and the forfeiture would operate prospectively from that time. *See id.* The court did not enter a judgment of forfeiture, apparently for the same reason that other inferior claims were denied – the superior tax liens would have exhausted the property in dispute, making futile an order of forfeiture that did not relate back prior to the time such liens were entered.

The DEA appealed, claiming that the district court erred in its construction of 21 U.S.C. § 881 by refusing to recognize that such forfeiture related back to the time the property was unlawfully used. The Colorado Department of Revenue filed a cross-appeal, contending that the district court erred in denying the validity of the Department's state sales tax and RTD sales tax liens. The Department further contends that even if the forfeiture relates back, sales tax proceeds held by Albert Levy are exempt from forfeiture under the so-called "innocent owner" exception of 21 U.S.C. § 881(a)(6).

II.

Three questions are presented by this appeal: first, whether civil forfeiture under 21 U.S.C. § 881 relates back to the moment that property was received in an illegal transaction, thereby voiding subsequent interests in the property; second, if forfeiture relates back, whether the sales tax liens, if valid, are preserved from forfeiture; and, finally, if such liens are preserved from forfeiture, whether the district court erred in placing the burden of

proof upon the Department of Revenue to establish that retail, and not wholesale, sales were involved.

A.

Civil forfeiture statutes, such as 21 U.S.C. § 881, "grow out of a legal heritage in which objects considered 'guilty' were held forfeit." *United States v. \$39,000 in Canadian Currency*, 801 F.2d 1210, 1218 n.4 (10th Cir. 1986). "The legal fiction underlying civil forfeitures characterizes them as proceedings *in rem* against 'offending inanimate objects' as defendants." *Id.* at 1218 (quoting *Bramble v. Richardson*, 498 F.2d 968, 971 (10th Cir.), *cert. denied*, 419 U.S. 1069 (1974)). The fiction that the "offense" was committed by the property subject to forfeiture underlies the common-law doctrine of relation back. At common law, after the government took legal steps to assert its rights to property subject to forfeiture, thereby vesting title to the property in the government, the doctrine of relation back applied in some cases to "carr[y] back the title to the commission of the offense." *United States v. Grundy & Thornburgh*, 7 U.S. (3 Cranch) 337, 350-51 (1806).

When Congress has provided for forfeiture by statute, however, we need not rely on the common law of forfeiture:

Where a forfeiture is given by a statute, the rules of the common law may be dispensed with, and [whether] the thing forfeited may either vest immediately, or on the performance of some particular act, shall be the will of the legislature. This must depend upon the construction of the statute.

App. 8

Id. at 351; see *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 404-05 (1814). The Supreme Court has stated as "settled doctrine" the following rule of construction:

[W]henever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith.

United States v. Stowell, 133 U.S. 1, 16-17 (1890).

With this rule of construction in mind, we turn to the relevant language of section 881:

The following *shall be subject to forfeiture to the United States and no property right shall exist in them*:

. . . .

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission

established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. § 881(a) (emphasis added).

We find that section 881, on its face, provides for immediate forfeiture to the government at the time the illegal act is committed. The United States' title in the illegally obtained property therefore relates back to the time of the offense. See *United States v. \$41,305.00 in Currency & Travelers Checks*, 802 F.2d 1339, 1346 (11th Cir. 1986); *Western Pac. Fisheries, Inc. v. SS President Grant*, 730 F.2d 1280, 1286-87 (9th Cir. 1984); *United States v. \$84,000 in United States Currency*, 717 F.2d 1090, 1101-02 (7th Cir. 1983), *cert. denied*, 469 U.S. 836 (1984); *United States v. One Parcel of Real Estate*, 660 F. Supp. 483, 487 (S.D. Miss.), *appeal dismissed without published op.*, 822 F.2d 57 (5th Cir.), *and aff'd and remanded for sanctions*, 831 F.2d 566 (5th Cir. 1987). But see *United States v. Thirteen Thousand Dollars in United States Currency*, 733 F.2d 581, 583-84 (8th Cir. 1984).

The Colorado Department of Revenue contends that section 881 is permissive, rather than mandatory, and therefore forfeiture does not relate back to the time of the offense. This argument is premised upon the fact that the language of section 881(a), "shall be subject to forfeiture," does not identically track the "shall be forfeited" language used by the Supreme Court in *Stowell*. This difference, the Department contends, prevents application of the relation back doctrine applied by *Stowell*. We disagree.

First, the Department's argument ignores the statutory language that follows: "The following [types of

property] shall be subject to forfeiture to the United States *and no property right shall exist in them . . .*" 21 U.S.C. § 881(a) (emphasis added). This language makes clear that property rights are divested immediately at the moment such property is used in a manner or context prescribed by section 881, and not at some future time. The language "subject to forfeiture" is merely used in this statute to give notice of the scope of property that shall be forfeited.

Second, in order to be a permissive statute, the face of the statute must provide an option for the government to institute forfeiture. See *Grundy & Thornburgh*, 7 U.S. (3 Cranch) at 350-52. In *Grundy & Thornburgh*, the forfeiture statute gave the government the option of pursuing an action for forfeiture of a ship or an action for the value of the ship. *Id.* at 351. Because such an option was present, the Supreme Court held that forfeiture of title did not relate back to the time of the illegal act. *Id.* at 354. No similar option exists in section 881. Although the government apparently could choose to forgo forfeiture altogether, see *Western Pac. Fisheries*, 730 F.2d at 1287 (noting that limitations period would prevent forfeiture action at some point), governmental discretion that is not founded on explicit language of the statute does not make the statute permissive.

The Colorado Department of Revenue further contends that section 881 is permissive because of its provision for an exception in the case of the so-called innocent owner:

[N]o property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by

that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. § 881(a)(6). The Department relies upon the following language in *Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) 44 (1871), which summarizes the rule applied in the cases decided up to that time:

Many such adjudged cases are to be found in the reported decisions of this court, and it must be admitted that they establish as the rule beyond all doubt, that the forfeiture becomes absolute at the commission of the prohibited acts, and that the title from that moment vests in the United States in all cases where the statute in terms denounces the forfeiture of the property as a penalty for a violation of law, without giving any alternative remedy, or prescribing any substitute for the forfeiture, or *allowing any exceptions to its enforcement*, or employing in the enactment any language showing a different intent

Id. at 57 (emphasis added). Thus, the Department argues that even if section 881 does not give an alternative remedy, as in *Grundy & Thornburg*, the fact that the statute provides an exception to its enforcement prevents forfeiture from relating back.

Whatever the merits of the rule stated by the Supreme Court in 1871, the Court's subsequent decision in *Stowell* made clear that an exception for innocent holders did not prevent forfeiture from relating back in the case of holders who did not qualify for the exception. A forfeiture statute in *Stowell* applied to real property owned by a person who " 'knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same.' " *Stowell*, 133 U.S. at 2 n.1

(quoting Act of Feb. 8, 1875, ch. 36, § 16, 18 Stat. 307, 310). Referring to that statute, the Court stated:

Congress had thus clearly manifested its intention that the forfeiture of land and buildings shall not reach beyond the right, title, and interest of the distiller, or of such other persons as have consented to the carrying on of the business of a distiller upon the premises.

Id. at 14. This did not preclude application of the relation back doctrine. *See id.* at 17-18.

Finally, we note that the legislative history of the 1984 amendments to section 881 also support this result. Section 881(h) was added in 1984 to state explicitly that forfeiture divested title upon commission of the illegal act. 21 U.S.C. § 881(h). The Senate report explaining that amendment shows that Congress relied upon the common-law "taint" theory – that property is considered tainted from the time of its prohibited use or acquisition – in enacting 21 U.S.C. § 881(h). *See* S. Rep. No. 225, 98th Cong., 2d Sess. 196, 215, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3379, 3398. The report notes that the relation back principle of 21 U.S.C. § 881(h) is "well established in current law," S. Rep. No. 225, 98th Cong., 2d Sess. 215, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3398, thus indicating that Congress had intended to apply relation back all along.

We therefore hold that when the government brings an action for forfeiture under 21 U.S.C. § 881, a judgment of forfeiture relates back to the time of the unlawful act, vesting title to forfeited property in the government as of that moment. Forfeiture therefore cuts off the rights of subsequent lienholders or purchasers, subject to the so-

called innocent owners exception in section 881(a)(6). We next must determine, therefore, whether the state sales tax liens, if valid, are preserved from forfeiture under this exception.

B.

The Colorado Department of Revenue contends that even if forfeiture under section 881 generally relates back to the time of the illegal transaction, its sales tax liens are preserved from such forfeiture under the innocent owner exception of section 881(a)(6). Under Colorado law,

[a]ll sums of money paid by the purchaser to the retailer as taxes imposed by this article shall be and remain public money, the property of the state of Colorado, in the hands of such retailer, and he shall hold the same in trust for the sole use and benefit of the state of Colorado until paid to the executive director of the department of revenue.

Colo. Rev. Stat. § 39-26-118(1) (1982). The Department thus claims that Albert Levy, the person transacting in drugs, never owned the sales tax portion of the drug sale proceeds, but merely held them in trust for the state, which was unaware of the use of such property in drug transactions. The Department contends that it qualifies as a so-called innocent owner of the property, thereby exempting the sales tax proceeds from forfeiture under 21 U.S.C. § 881(a)(6).

This argument misapprehends the fact that forfeiture occurs before any property interest in a sales tax "trust" arises. The innocent owner exception applies only to owners whose interest vests prior to the date of the illegal

act that forms the basis for the forfeiture. *United States v. One Parcel of Real Estate*, 660 F. Supp. at 487; cf. *Simons v. United States*, 541 F.2d 1351, 1352 (9th Cir. 1976) (applying same principle to 49 U.S.C. § 782). The sales tax trust alleged in this case does not exist until the vendor receives value from the purchaser. The Colorado statute upon which the Department relies clearly states that the trust applies to all "sums of money *paid* by the purchaser to the retailer" and that such payments do not become "public money" until they are "in the hands of such retailer." Colo. Rev. Stat. § 39-26-118(1).

In contrast, forfeiture under section 881 occurs before value is received by the vendor. Section 881(a)(6) applies to "[a]ll moneys, negotiable instruments, securities, or other things of value *furnished or intended to be furnished by any person in exchange for a controlled substance.*" 21 U.S.C. § 881(a)(6). Forfeiture therefore occurs while the value is still in the hands of the purchaser, at the moment when the purchaser manifests intent to exchange value for a controlled substance.

We find that the Colorado Department of Revenue is not an innocent owner for purposes of section 881(a)(6) because the title to such property vested in the United States through forfeiture prior to any ownership interest held by the State. Because we find that the state sales tax liens are not exempt from forfeiture, we need not address whether the district court erred in requiring that the Department of Revenue establish that retail, and not wholesale, sales were involved.

III.

We hold that the property at issue in this case should be forfeited to the United States and that title in the United States relates back to the time of the illegal drug transaction, thereby defeating all competing claims to the property. The district court did not enter an order of forfeiture for the apparent reason that such an order would be futile if superior claims would exhaust the property. From the stipulated facts, we see no reason why such an order should not be granted. We therefore REVERSE and REMAND to the district court with direction to enter an order of forfeiture in favor of the United States and to direct such other action as may be appropriate and consistent with this opinion.

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

CIVIL ACTION NO. 82-K-2144

PETER M. EGGLESTOM, et al.,

Plaintiffs,

v.

THE STATE OF COLORADO, et al.,

Defendants.

CIVIL ACTION NO. 82-K-2228

UNITED STATES OF AMERICA,

Plaintiff,

v.

**\$1,508,440.00 IN UNITED STATES
CURRENCY,**

Defendant.

CIVIL ACTION NO. 83-K-403

UNITED STATES OF AMERICA,

Plaintiff,

v.

TWELVE GOLD BARS,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed May 30, 1986)

KANE, J.

This *in rem* proceeding is comprised of three separate cases which have been consolidated. The parties in this action are: Peter Eggleston, trustee for the Albert C. Levy Irrevocable Trust; Victoria Levy; Albert Levy; the State of Colorado, by and through the Arapahoe County District Attorney; the City of Lakewood; the Colorado State Department of Revenue; Jefferson Bank & Trust; the United States, Drug Enforcement Administration (DEA); and the Internal Revenue Service (IRS). Each of these parties claims an interest in, and entitlement to, all or part of the *res* in this case. The *res*, which was seized by Lakewood police from Albert and Victoria Levy's home, consists of 12 one ounce gold bars and approximately \$1.5 million plus accrued interest. The parties seek an adjudication of their respective priorities to this property.

In the last few years a discernible shift in the methodology of law enforcement has taken place. Federal, state and local agencies have placed a new emphasis on depriving criminal activity of its largesse. The means used include forfeiture, levy, revocation of licenses, declaration of public nuisances and civil proceedings for injunctions and recoupment. Some of these means have existed for a considerable time; others are innovative. While the law of forfeiture is ancient, it has been substantially changed by both federal and state legislation. Most notable among the spate of legislative enactments has been the Comprehensive Crime Control Act of 1984, which includes the Comprehensive Forfeiture Act of 1984. It is generally recognized and admitted that this Act was passed so hastily that the use of the term "comprehensive" in its title is more aspirational than descriptive.

What has yet to be addressed at all by legislation and only fleetingly by case decisions is the horripilating confusion occasioned by different law enforcement agencies pouncing upon the same assets with each claiming the right to drag the spoils of this war on crime to its own lair. Simply stated, there is no legislation which sets priorities for these conflicting claims. The case before me requires that I determine such priorities in the absence of guidance or controlling precedent. I make no pretense of presenting a definitive solution to the problem. I suggest only that this opinion is an effort to fill this lacuna in the structure of the law. I am certain, however, that legislation alone will provide a satisfactory solution to future cases which are certain to follow.

The parties have stipulated to the relevant facts and trial has been waived. Briefs have been submitted and read. Oral arguments were heard on May 12, 1986. Before I consider the parties' arguments and the applicable law, I shall set forth the facts necessary for decision in this case.

I. FACTUAL BACKGROUND

The stipulated facts, which are contained in the third amended pre-trial order, are as follows:

On November 25, 1981, Lakewood Police Officer Worsham stopped a Porsche on West Colfax Avenue for a traffic violation. The occupants, Douglas Keiser and Carlos Smith, were arrested for possession of cocaine found in the car. While processing Keiser and Smith at the police station, Lakewood Police Officer Shupe copied the contents of an address book and certain other papers found in the men's possession because they contained

notations and telephone numbers which aroused suspicion. The copies were given to Agent LaBelle who ran checks on the names listed. Agent LaBelle discovered that several of the persons listed had been arrested or convicted of drug-related offenses.

In May, 1982, Smith agreed to become an informant for Agent LaBelle. Based on information provided by Smith regarding a drug distribution organization, pen register devices were installed on the telephone lines at Keiser's residence in Conifer, Colorado. That installation was authorized by a Jefferson County court order entered June 1, 1982.

During the second week of June, 1982, additional county court orders were issued for the installation of pen register devices on telephone numbers at the residence of Lawrence Levy (son of Victoria and Albert Levy) in Conifer. Also, during June, 1982, the DEA served administrative subpoenas on the telephone company and obtained telephone toll records for the Keiser and Levy phones.

On November 16, 1982, listening devices were placed in Albert and Victoria Levy's home in Aurora, Colorado, pursuant to an Arapahoe County district court order. Four days later, based upon information gathered by these devices, Lakewood police obtained a search warrant for the Levy home. On November 21, 1982, Lakewood police executed the warrant, seizing approximately \$1.5 million in currency from a safe and a suitcase and 12 one ounce gold bars. This property was the product of an illegal exchange for purchase of cocaine. Albert and Victoria Levy were arrested.

On December 1, 1982, Albert Levy created an irrevocable trust for the purpose of paying federal income taxes. Levy transferred his interest in the monies seized to the trust. The IRS was designated as the principal beneficiary and Peter Eggleston was appointed as trustee.

On December 2, 1982, the State of Colorado, by and through the Arapahoe County district attorney, commenced a nuisance action in the Arapahoe County district court, pursuant to Colo. Rev. Stat. §§ 16-13-303(1)(c), 16-13-303(3)(a)-(c), for forfeiture of the monies.¹

Four days later, Jefferson Bank & Trust brought an action in the state court in Arapahoe County against Albert Levy for an unsecured debt owed by Levy to the bank. The bank obtained and served pre-judgment writs of attachment on the sheriffs of Arapahoe, Jefferson, and Denver counties, seeking to attach the seized monies. The bank also served pre-judgment writs of garnishment upon the Lakewood Department of Public Safety, the sheriffs of Arapahoe and Jefferson counties, and the DEA.

On December 15, 1982, Eggleston and Levy filed an action in this court (No. 82-K-2144) against the State of Colorado, the City of Aurora, the City of Lakewood, and several John Does, seeking declaratory relief, an injunction restraining the state nuisance action, and damages for alleged civil rights violations. The complaint in this action was later amended to include the United States and the IRS as defendants.²

The next day, December 16, 1982, the Arapahoe County district court judge presiding over the state nuisance proceeding ordered the Lakewood Department of Public Safety to relinquish custody of the seized monies

to Eileen Manning, clerk of the Arapahoe County district court. The court further ordered, with the parties' express consent, that the monies be deposited in an interest-bearing bank account. Manning received the monies and deposited them in the United Bank of Littleton. A certificate of deposit was issued to Manning.

On December 22, 1982, pursuant to Colo. Rev. Stat. §§ 39-26-118(2)(a) and 39-22-602, the Colorado Department of Revenue prepared sales, income, and RTD tax assessments against Albert Levy. The department issued jeopardy assessments pursuant to Colo. Rev. Stat. § 39-21-111 and warrants for distraint pursuant to Colo. Rev. Stat. § 39-21-114. On December 23, 1982, a notice of lien for state taxes was filed with the Clerk and Recorder of Arapahoe County. A warrant for distraint was filed with the clerk of the Arapahoe County district court, who entered it into the judgment docket. The clerk then issued a transcript of judgment docket which was sent to the Clerk and Recorder of Arapahoe County. The department served notices of tax lien and garnishment under distraint for collection upon the Arapahoe County district court clerk. Judgment in favor of the department was entered on December 23, 1982 as follows: Colorado sales tax - \$115,880.12, RTD sales tax - \$19,313.39, and income tax - \$58,677.00. These assessments remain unpaid.

Also on December 23, 1982, the United States filed a complaint in this court (No. 82-K-2228) for forfeiture of the monies pursuant to 21 U.S.C. § 881(a)(6) and applied to the court clerk for a warrant for arrest of the currency.

On January 3, 1983, Judge Carrigan, who was presiding over this action at the time, ordered: 1) the warrant

for arrest of the defendant currency be issued, 2) the United States Marshal arrest the defendant currency, 3) Manning be appointed as substitute custodian of the currency, 4) the marshal transfer custody from himself to Manning as substitute custodian, 5) publication of notice be made by the marshal, and 6) the complaint and warrant of arrest be served on the Arapahoe County district court clerk.

On January 4, 1983, the notice of arrest and seizure by the marshal was issued and the marshal returned the receipt of service of process on Manning. Also, the United Bank of Littleton issued a receipt to the marshal for storage of the currency.

On January 5, 1983, the IRS terminated Albert Levy's taxable period for 1982 and assessed a tax liability of \$1,962,563.00. The IRS served a notice of levy on the Arapahoe County district court clerk, requesting all property and rights to property of Albert Levy in order to satisfy the income tax assessment. Notices of the federal tax lien were filed with the Clerks and Records of Pitkin and Jefferson counties on January 24, 1983, and Arapahoe County on January 25, 1983. A notice of final demand was served on the Arapahoe County district court clerk on March 24, 1983.

Beginning on January 11, 1983, and continuing on January 18th and 25th, notice of the arrest and seizure of the currency was published in the Rocky Mountain News. On January 14, 1983, the state nuisance action was dismissed. This action was, however, refiled on January 26, 1983.

On March 11, 1983, the United States filed a complaint in this court (No. 83-K-403) for forfeiture of the gold pursuant to 21 U.S.C. § 881(a)(6). On March 14, 1983, a warrant for arrest of the gold bars was issued. On March 15, 1983, I entered judgment in favor of the IRS sustaining its termination assessment. The assessment of \$1,962,563.00 remains unpaid.

On March 22, 1983, I appointed the IRS as receiver of the monies and consolidated the three actions. On March 25, 1983, I issued an order appointing the United States district court clerk as superseding custodian. On April 4, Manning tendered the certificates of deposit to the United States Marshal, who took custody. The next day, the marshal relinquished custody of certificate to James Manspeaker, Clerk of the U.S. District Court.

On April 6, 1983, the marshal arrested the gold bars. Notice of the arrest and seizure of the gold bars was published in the Rocky Mountain News on May 13, 17, and 20, 1983.

On January 26, 1984, Albert Levy plead guilty before Judge Matsch to one count of 18 U.S.C. § 371, conspiracy to defraud the United States by evading and defeating the collection of taxes by the IRS for income derived from the illegal distribution of cocaine. Criminal charges against Victoria Levy were dismissed on February 9, 1984.

On April 3, 1984, a stipulation, confession of judgment and order of judgment was entered in the Arapahoe County district court against Albert Levy and in favor of Jefferson Bank & Trust in the amount of \$373,243.76 plus interest. Levy assigned to the bank, to the extent of the judgment, his interest in the trust.

On May 4, 1984, the government amended its complaint for forfeiture to include alternative claims by the IRS. Under these claims, in the event the monies are not forfeited to the United States, the IRS seeks foreclosure of the federal tax lien.

On May 29, 1984, the state nuisance action in the Arapahoe County district court was again dismissed upon motions by Albert and Victoria Levy.

With these facts in mind, I now turn to the parties' claims and the determination of their priorities.

II. CLAIMS

The parties' general claims to the *res* follow:

Albert Levy and Peter Eggleston argue the Albert C. Levy Irrevocable Trust has priority to the monies which should be paid to the IRS, as the principal beneficiary of the trust, in satisfaction of Levy's income tax liability.

Victoria Levy asserts the federal income taxes should be paid and, as a matter of equity, any remaining balance should be returned to her.

Jefferson Bank & Trust claims priority to the fund on two bases. First, the bank claims a derivative interest to the currency through the trust by virtue of an assignment of Levy's interest in and to the trust on April 3, 1984. Second, the bank claims a lien against the monies based on its pre-judgment writs of attachment and garnishment.

The Colorado Department of Revenue maintains a portion of the currency found in the Levys' residence was collected, or should have been collected, as state sales tax

and remitted to the state at the moment of the sale of the drugs. According to the department, the amount for sales tax became public monies at the time of the sale of the drugs and Levy was a trustee for the state with respect to these monies. Regarding the state income tax owed by Albert Levy, the department contends its lien has priority.

The State of Colorado asserts the monies constitute a class I nuisance under the Colorado public nuisance statutes, Colo. Rev. Stat. §§ 16-13-301 *et seq.* and, thus, the state is entitled to forfeiture of the monies. In the alternative, the state requests reimbursement of \$42,593.78 for the costs of its investigation.

The City of Lakewood's claim is derivative in nature. Lakewood requests reimbursement of the costs of its investigation if the state nuisance or the DEA's forfeiture claim is given priority.

The federal government maintains the DEA's claim for federal forfeiture under 21 U.S.C. § 881(a)(6) prevails over all other competing interests in the res. It is asserted, under § 881, that forfeiture takes place at the moment of illegal use of the res. At that instant, all rights and legal title to the property pass to the government.

Finally, the IRS contends, first, the monies should be forfeited to the United States under § 881 because forfeiture takes place at the moment of illegal use and the taxpayer has no rights to which a subsequent federal tax lien can attach. In the alternative, the IRS contends its tax lien prevails over all other claims except that of the Colorado Department of Revenue.

III. PRIORITIES OF THE PARTIES' CLAIMS

For the reasons stated below, I find the IRS's claim to the currency and the gold bars is superior to all of the other claims in this case except that of the Colorado Department of Revenue for state income tax owed by Albert Levy.

A. Federal Tax Liens and the IRS's Claim

Broad powers of taxation are granted to Congress by express provisions of the Constitution. *See, e.g.,* U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes"); amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived. . . ."). In order to execute these powers, Congress has authority to enact any necessary laws. *See* U.S. Const. art. I, § 8, cl. 18. Needless to say, this authority has been exercised on many occasions. The Internal Revenue Code of 1954, 26 U.S.C. §§ 1 *et. seq.*, as amended and revised, embodies the statutes for imposition and collection of taxes.

The Secretary of the Treasury and the IRS are charged with the duty of collecting taxes. 26 U.S.C. § 6301. Ordinarily, assessments of tax liability and notice and demand are not required for collection of taxes. *See* 26 U.S.C. § 6151(a). Where, however, the Secretary finds the collection of taxes is jeopardized by an act of the taxpayer, the Secretary must "immediately make a determination of tax for the current taxable year . . . [and] assess the amount of the tax so determined. . . ." 26 U.S.C. § 6851(a)(1). Once this assessment is made, "notice of such determination

and assessment . . . , together with a demand for immediate payment of . . . [the] tax," must be given to the taxpayer. *Id.*

If the taxpayer refuses or fails to pay the tax after demand for payment has been given, a federal tax lien arises in favor of the government for the amount of the tax upon all of the taxpayer's real and personal property or rights to such property. 26 U.S.C. § 6321. This lien arises, by operation of law, at the time the assessment is made and it continues until the tax liability is satisfied or it becomes unenforceable by reason of lapse of time. 26 U.S.C. § 6322.

In the instant case, the IRS received information that Albert Levy intended to leave the country and to remove or conceal his assets so as to place them beyond the reach of the government. Accordingly, on January 5, 1983, the IRS terminated Levy's 1982 taxable year as of November 30, 1982, and assessed a tax liability of \$1,962,563.00. — Notice of this termination assessment and demand for payment were given to Levy. To date, Levy has failed or refused to pay this amount.

On March 14, 1983, I upheld the termination assessment, ruling that it was reasonable under the circumstances. At that time, I did not explicitly address the validity of the tax lien which arose from the assessment. I now find, however, that the requirements for such a lien have been met and, as of January 5, 1983, a federal tax lien arose in favor of all of Levy's real and personal property and rights to property. 26 U.S.C. § 6321.

The initial question in determining the priority of a federal tax lien with respect to certain property is

whether the lien has attached to that property. If the taxpayer has no interest in or title to the subject property, the tax lien cannot attach and priority cannot be given to the lien. See 26 U.S.C. § 6321. State law determines the extent of a taxpayer's interest in property to which a federal tax lien can attach. See *Aquilino v. United States*, 363 U.S. 509, 512-13, 80 S.Ct. 1277, 4 L.Ed.2d 1365 (1960).

On the other hand, federal law determines priority as between a federal tax lien and other competing claims against the taxpayer's property or rights to property. *Id.* at 513-14; see also *Allan v. Diamond T Motor Car Co.*, 291 F.2d 115, 117 (10th Cir. 1961). Generally, under federal law, federal tax liens prevail over all claims to the taxpayer's property except those which have been perfected or become choate before the tax lien attaches. Thus, once it has been determined that the taxpayer has rights to the subject property to which the tax lien has attached, it must be ascertained whether the competing claims were choate in order to affix priorities. An interest or lien in the property becomes choate "when the identity of the lienor, the property subject to the lien, and the amount of the lien are established." *United States v. New Britain*, 347 U.S. 81, 84, 74 S.Ct. 367, 98 L.Ed. 520 (1954); see also *United States v. L.R. Foy Construction Co., Inc.*, 300 F.2d 207, 210-11 (10th Cir. 1962).

Next, the order in which the liens attach to the subject property and become perfected must be determined because, in general, "the first in time is the first in right." See *New Britain*, 347 U.S. 81, 85; *Southwest Engine Co. v. United States*, 275 F.2d 106, 107 (10th Cir. 1960).³ Thus, if the federal tax lien arises and attaches to the taxpayer's

property before a claimant's lien has become choate, the tax lien prevails.

With these principles and facts in mind, I now turn to a consideration of each of the parties' claims in this case and its priority *vis a vis* that of the federal tax lien.

B. The State of Colorado's Claim

The state argues, first, that the tax lien could not attach to the currency and the gold bars because Albert Levy had no interest in or title to this property on January 5, 1983. According to the state, under Colorado law, a person loses all legal rights to property once it is seized pursuant to the Colorado public nuisance statutes. Thus, the state asserts: 1) Albert Levy was divested of title to the *res* at the moment it was seized by the state; 2) the IRS tax lien could not attach to this property since it did not belong to Levy; and 3) the IRS therefore has no priority to the currency and the gold bars in this case.

The issues raised by the state have been presented to this court before in two cases and are currently the subject of an appeal before the Tenth Circuit. In the first case, *United States v. Wilkinson*, No. 81-C-2061, the IRS learned that the Boulder County sheriff's department had seized property, including currency, precious gems, and narcotics, from the home of Gerald Wilkinson on June 11, 1980. The following day, the County of Boulder filed a nuisance action in the Boulder County district court seeking forfeiture of the seized property. On June 18, 1980, the IRS made a termination assessment against Wilkinson. Notice of the federal tax lien which arose from this

assessment was filed with the Clerk and Recorder of Boulder County on June 19, 1980. On October 14, 1980, the Boulder County district court entered an order *nunc pro tunc* to the date of seizure, forfeiting the property to Boulder County as of that date. The IRS then filed an action in this court seeking to foreclose the federal tax lien. Judge Carrigan, who presided in that case, recognized that a controlling question was whether, after the date of seizure, Wilkinson retained any property rights in the items seized to which the tax lien could attach. Finding no direction on this issue in the statutes or in Colorado case law, Judge Carrigan certified the question to the Colorado Supreme Court.

On August 27, 1984, the Colorado Supreme Court ruled on the question certified, holding that "[n]o property interest is retained by a person subsequent to the seizure of property but prior to a final judicial determination [that the property is forfeited]." *In re Interrogatories of the U.S. District Court: United States v. Wilkinson*, 686 P.2d 790, 794 (Colo. 1984). In arriving at this decision, the court deduced an intent by the state legislature to divest the property owner of all legal title as of the date of seizure from the legislature's stated policy that "every public nuisance shall be restrained, prevented, abated, and perpetually enjoined." Colo. Rev. Stat. § 16-13-302. In what was understandably an exercise in eisegesis, the court reasoned unless the property owner was divested of all legal right to the property after it was seized, the property could be transferred to the benefit of the owner and the forfeiture action would be frustrated. *Id.* at 792-93.

The court also applied a legal fiction commonly referred to as the "relation back doctrine" in reaching its conclusion that property rights are forfeited at the time of seizure. *Id.* at 793-94. This doctrine, which is often applied to forfeiture statutes, was first clearly set forth in *United States v. Stowell*, 133 U.S. 1, 10 S.Ct. 244, 33 L.Ed. 555 (1890). There, the United States Supreme Court stated:

Whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed, and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith.

Stowell, 133 U.S. 1, 16-17 (emphasis added).

Applying this doctrine to forfeitures under the Colorado public nuisance statutes, the court held that "a final forfeiture order pursuant to section 16-13-309 relates back to the date of seizure of the property." *In re Interrogatories*, 686 P.2d 790, 794. Thus, according to the Colorado Supreme Court, once property is seized pursuant to the public nuisance statutes, the owner is divested of all legal title and, upon a final order of forfeiture, the governmental entity's right to the property relates back to the date that the property was seized.

Based on this decision, Judge Carrigan ruled against the IRS, holding that "Wilkinson's property rights ended on . . . the date of the seizure." *United States v. Wilkinson*, No. 81-C-2061, slip op. at 3 (D. Colo. July 25, 1985)(Order). This case is presently on appeal before the Tenth Circuit.

The second case in this district which raised the same issues of divestiture of property rights upon seizure and the governmental entity's right to the seized property was *United States v. Wingfield*, No. 82-CR-264. In that case, the defendant was arrested at his home in Boulder for unlawful flight to avoid prosecution. At the time of the arrest, a Boulder police officer observed marijuana in Wingfield's residence. A search warrant was obtained and, in the course of a search of the house, Boulder police seized narcotics, currency, and silver bars. Three days later, on November 8, 1982, a nuisance action was filed in Boulder County district court. On January 13, 1983, the IRS made a termination assessment against Wingfield for federal income taxes. Notice of the lien which arose from this assessment was filed on January 19, 1983. On May 17, 1983, the state court entered an order effective *nunc pro tunc* to the date of seizure, holding, *inter alia*, that the property was forfeited to the county.

Meanwhile, Wingfield was convicted on federal criminal charges on February 11, 1983. On September 1, 1983, after various conflicting claims to the property had been asserted, I ordered the funds be deposited with the United States District Court Clerk. At a hearing regarding these claims on August 20, 1984, I ruled as follows:

The principal responsibility of the Internal Revenue Service is to enforce the collection of taxes

and see to their deposit in the public fisc. It is not authorized by the Congress of the United States to relax its vigilance or, out of some notion of cooperation with local law enforcement agencies, to subvert its principal responsibility of collecting taxes because of some secondary gain which might be obtained in terms of cooperation with law enforcement, and I think I should make it very clear that where federal taxes are due, particularly where they are due as the result of obtaining monies or profits from a criminal enterprise, that the United States government is not free to waive its rights to funds or to act in such a manner as to become junior to a state agency or municipality acting under a state statute. State statute[s] cannot subvert the primary authority of the federal government to collect its taxes under these circumstances.

Therefore, the Clerk of the Court is ordered to honor and satisfy the claim of the Internal Revenue Service. If there are any proceeds left over, the remainder of the funds shall be used to satisfy or partially satisfy the junior and inferior claim of the County of Boulder. The claimant Wingfield is not entitled to any of the funds. The funds which the IRS collects are justified as payment of the taxes due by Wingfield and, therefore, shall be applied to that particular amount.

United States v. Wingfield, No. 82-CR-264, transcript of hearing at 13-14 (D. Colo. August 20, 1984); see also *United States v. Wingfield*, No. 82-CR-264 (D. Colo. August 28, 1984)(Order).

Boulder County has appealed this decision. The county asserts in its briefs before the Tenth Circuit, based

on the Colorado Supreme Court's decision in *In re Interrogatories*, that Wingfield was divested of his rights to the property at the time of seizure and, thus, the federal tax lien could not attach to the property. Oral arguments were heard in May, 1985 but the Tenth Circuit has yet to render its decision in that case.

The issues presented in both *Wilkinson* and *Wingfield* are identical to those in the instant case. I recognize state law determines a taxpayer's interest in the subject property and, under *In re Interrogatories*, a person is divested of legal title to the property at the time of seizure. This does not mean, however, that Albert Levy had no property interest in the *res* to which the tax lien could attach. Rather, I find the state's argument that the tax lien did not attach to the property because it did not belong to Levy and, therefore, the tax lien has no priority to the *res* must fail for three reasons.

First, under *In re Interrogatories*, a person is divested of title to property "subsequent to . . . [its] seizure . . . but prior to a final judicial determination." 686 P.2d 790, 794. Clearly, it cannot be said that the owner loses all rights to, for example, currency at the moment it is seized where there is no final judicial determination that the currency was used in connection with a drug transaction and, therefore, constituted a public nuisance, or where a court declines to condemn the property on the ground that the currency was not used in the sale or purchase of narcotics. Either result would contravene due process. More appropriately, until the property is declared forfeit, the governmental entity seeking forfeiture has an interest in the property and the owner retains legal title even though he may not have the right to possess the property.

If forfeiture is later declared, the governmental entity's interest is perfected and the owner is deemed divested of the property as of the date it was seized pursuant to the nuisance statutes. Thus, a person is divested of title to property at the time of seizure but only if there is a subsequent judgment of forfeiture.

In the present case, there has been no final determination of forfeiture under the Colorado public nuisance statutes. The state nuisance action was dismissed on January 14, 1983, refiled on January 26, 1983, and dismissed again on May 29, 1984. Since there has been no judgment of forfeiture, I find that Albert Levy was not divested of his legal right to the property which is the subject of this action and the federal tax lien attached to that property.

Second, the state's argument overlooks the well-established doctrine of choateness. As stated above, a federal tax lien is junior only to a competing claim that was choate before the lien attached to the *res* in dispute. See *United States v. Pioneer American Insurance Co.*, 374 U.S. 84, 88, 83 S.Ct. 1651, 10 L.Ed. 2d 770 (1963); *New Britain*, 347 U.S. 81, 86. In the instant case, it is clear that the state's right to the *res* has not been established or perfected by a final judgment of forfeiture. Thus, the state's claim was not choate at the time the IRS's lien arose and attached to the *res*.

Further, the state's position "ignores the effect of a lien for federal taxes under the supremacy clause of the Constitution." *Michigan v. United States*, 317 U.S. 338, 340, 63 S.Ct. 302, 87 L.Ed. 312 (1943). As the United States Supreme Court stated in *United States v. Rodgers*, 461 U.S.

677, 683, 103 S.Ct. 2132, 76 L.Ed.2d 236 (1983), a federal tax lien is one of the "formidable arsenal of collection tools," essential "to ensure the prompt and certain enforcement of the tax laws in a system relying primarily on self-reporting." See also *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 350, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977); *Matter of Carlson*, 580 F.2d 1365, 1368 (10th Cir. 1978). "The establishment of a tax lien by Congress is an exercise of its constitutional power 'to lay and collect taxes.'" *Michigan* 317 U.S. 338 340. Application of the relation back doctrine cannot be held to subvert that constitutional power. While this legal fiction may merge a later judgment into an earlier attachment under state law, thus according a prevailing party priority over intervening creditors or claimants, it cannot affect or impair the priority of a federal tax lien under established principles of choateness and long-standing congressional declaration of policy. See, e.g., *United States v. Wadill, Holland & Flinn, Inc.*, 323 U.S. 353, 357, 65 S.Ct. 304, 89 L.Ed. 294 (1945); *Rodriguez v. Escabrom Development Corp.*, 740 F.2d 92, 98 (1st Cir. 1984); see also *United States v. Acri*, 348 U.S. 211, 213-14, 75 S.Ct. 239, 99 L.Ed. 264 (1955); *United States v. Security Trust and Savings Bank*, 340 U.S. 47, 50, 71 S.Ct. 111, 95 L.Ed. 53 (1950). The reason for this is readily apparent. If state courts and legislatures could, by invocation of the relation back doctrine, give third parties priority over federal tax liens, those liens would be rendered nugatory at will. See, e.g., *New Britain*, 347 U.S. 81, 86. Such a practice would destroy the meaning of the supremacy clause and severely affect the constitutional authority and ability of the federal government to collect revenue.⁴

For these reasons, I find: 1) Albert Levy was not divested of title to the currency and the gold bars at the time they were seized, 2) Levy had an interest in the property to which the federal tax lien attached on January 5, 1983, 3) the state's claim for forfeiture was not established and was not choate at the time the federal tax lien arose, and 4) the IRS has priority over the state to the *res* in this case.

C. The DEA's Claim

The DEA's assertion that it is entitled to first priority and forfeiture of the *res* in this case is also without merit. When § 881 was originally enacted, Congress failed to provide any guidance as to when property used in drug transactions was forfeited to the government and, thus, at that point the government's interest would have priority.⁵ To fill this void in the statute, courts applied the relation back doctrine. See *Western Pacific Fisheries, Inc. v. S.S. President Grant*, 730 F.2d 1280, 1287 (9th Cir. 1984); *United States v. \$84,000.00 in United States Currency*, 717 F.2d 1090, 1101-1102 (7th Cir. 1983), *cert. den. sub. nom. Holmes v. United States*, ___ U.S. ___, 105 S.Ct. 131, 83 L.Ed.2d 71 (1984); *O'Reilly v. United States*, 486 F.2d 208, 210 (11th Cir. 1973), *cert. den.*, 414 U.S. 1043, 94 S.Ct. 546, 38 L.Ed.2d 334 (1973); *United States v. One Piece of Real Estate*, 571 F. Supp. 723, 725 (W.D. Tex. 1983); *United States v. One 1975 Chevrolet K-5 Blazer*, 495 F. Supp. 737, 744 (W.D. Mich. 1980); see also *United States v. One 56-Foot Yacht Named Tahuna*, 702 F.2d 1276, 1279 (9th Cir. 1983).

In applying this doctrine, however, these courts failed to consider the doctrine's distinction between mandatory and permissive forfeiture statutes. Under *Stowell*, this legal fiction applies only where the statute in question mandatorily requires that upon the commission of a specified act, property "shall be forfeited." Unlike the mandatory forfeiture statute at issue in *Stowell*, § 881 is permissive because it states that, upon the commission of a specified act, property is only "subject to forfeiture." Since § 881 is a permissive forfeiture statute, the relation back doctrine has no application. See *United States v. Thirteen Thousand Dollars in United States Currency*, 733 F.2d 581, 584 (8th Cir. 1984)(the relation back doctrine is inapplicable to § 881 forfeitures); see also *United States v. Currency Totalling \$48,318.08*, 609 F.2d 210, 212-13 (5th Cir. 1980)(the relation back doctrine does not apply where the statute provides only for a possibility of subsequent forfeiture). Accordingly, the DEA's interest in the *res* in this case can vest only upon a judgment in favor of the government for forfeiture. Such a judgment has not been rendered in this case. The federal tax lien therefore has priority under the doctrine of choateness.

D. The Colorado Department of Revenue's Claim

With respect to the Colorado Department of Revenue's claim to the currency and the gold bars, I must determine whether the liens for state sales, RTD, and income taxes are valid before I can consider the relative priority of these liens.⁶ It has been stipulated that Albert Levy sold cocaine, receiving the currency and gold bars as payment. Under Colorado law, state sales and RTD taxes can be imposed on this drug sale only if it is

construed as a retail, rather than as a wholesale, transaction. See Colo. Rev. Stat. § 39-26-104(1)(a). The department has offered no evidence which would indicate that this drug sale was anything other than a wholesale transaction. Accordingly, I find that state sales and RTD taxes may not be levied on this sale and, thus, the liens for such taxes are invalid. On the other hand, I find that state income tax may be levied on the profit or gain realized from this sale since income derived from any source is taxable under state law⁷ and, thus, the lien for state income taxes is valid.

Further, I find that this lien for income taxes has priority over the federal tax lien. Under Colo. Rev. Stat. § 39-21-115(4), filing of a notice of lien for state taxes "with the person in possession of any personal property or rights to property belonging to the taxpayer, . . . operate[s] as a lien upon such personal property or rights to property from the date of such filing." On December 23, 1982, the department served a notice of lien for state taxes upon the Arapahoe County district court clerk who, at that time, had custody of the certificate of deposit. As of that date, the department's lien was choate since the identity of the lienor, the amount of the lien for state income' tax, and the property to which the lien attached were established. Because this lien pre-dates that of the IRS, it has priority under federal law.

E. Jefferson Bank & Trust's Claim

Jefferson Bank & Trust has made two separate claims to the *res* in this case. First, the bank claims a derivative

interest by virtue of an assignment of Albert Levy's interest in the trust, which assignment was part of a settlement agreement between those parties on April 3, 1984. Second, the bank claims a lien against the *res* based on its pre-judgment writs of attachment and garnishment which were served on December 6, 1982. Neither of these claims has priority over the federal tax lien. Any interest which the bank obtained by assignment on April 3, 1984 would be burdened by the earlier tax lien. *See, e.g., United States v. Bess*, 357 U.S. 51, 57, 78 S.Ct. 1054, 2 L.Ed.2d 1135 (1958)(property which is transferred after the attachment of a federal tax lien remains burdened by the lien); *Michigan*, 317 U.S. 338, 340. Additionally, since the bank did not obtain a confession of judgment against Levy until April, 1984, its claim based on the judgment was inchoate at the time the federal tax lien arose and the notices of the tax lien were filed. *See United States v. Liverpool & London & Globe Insurance Co., Ltd.*, 348 U.S. 215, 217, 75 S.Ct. 247, 99 L.Ed. 268 (1955) (pre-judgment writ of garnishment inchoate as to later obtained federal tax assessment and filing of notice of federal tax lien where judgment was obtained after assessment and filing of lien); *United States v. Acri*, 348 U.S. 211, 214, 75 S.Ct. 239, 99 L.Ed. 264 (1955)(attachment lien was inchoate because, at the time the attachment lien issued, the fact and the amount of the lien were contingent upon later judgment); *Security Trust & Savings Bank*, 340 U.S. 47, 50. Accordingly, I find that the federal tax lien in this case has priority over both of the bank's claims to the *res*.

F. Victoria Levy's Claim

I need not address Victoria Levy's claim to the currency and the gold bars *vis a vis* the IRS's claim because Victoria Levy does not assert any priority over the federal tax lien. Indeed, she asserts that the federal income taxes should be paid.

G. City of Lakewood's Claim

Similarly, I need not address the city's claim for reimbursement of investigation costs because I find that neither the DEA nor the state has priority over the IRS to the *res*.

H. Albert Levy's and Eggleston's Claim

Regarding Albert Levy's and Eggleston's claim to the currency and the gold bars, it is asserted by the state that the trust is a nullity since Levy had no property interest in the *res* to convey to the trust at the time it was created. As discussed above, I find that Levy did have title to the property at that time. Under the circumstances of this case, seizure of the *res* did not divest Levy of title. I find, however, that the trust is void on other grounds and, thus, is not entitled to the priority claimed by Levy and Eggleston.

To begin with, assuming, but not deciding, that the trust may be valid in other respects, I find the trust is unfunded. At the time the trust was created, Albert Levy did not have possession of the currency and the gold bars. Possession has never been in the trustee nor, under the decision in this case, will the trustee ever possess the *res*. Additionally, enforcement of this alleged trust would

be against public policy, even though its performance would not be illegal. See Restatement (2d) of Trusts § 62. Levy's clear intent in creating this trust was to hinder or defeat all other claims in creating this trust except that of the IRS so that the currency and gold bars could be used to satisfy his enormous tax liability. I recognize that an assignment for the benefit of certain creditors is permissible under Colorado law. See *Farmers Acceptance Corp. v. De Lozier*, 178 Colo. 291, 496 P.2d. 1016 (Colo. 1972). Under the circumstances of this case, however, Levy's motive was improper and cannot be condoned. Accordingly, I find that Levy's and Eggleston's claim to the *res* is without merit and the federal tax lien prevails over this claim.

IT IS THEREFORE ORDERED THAT:

1. The Colorado Department of Revenue's lien for state income taxes has priority to the *res* and shall be satisfied in full. The remainder of the *res* shall be applied to the debt owed by Levy for federal income taxes in partial satisfaction of the amount of the tax lien. All other claims are denied.

Dated at Denver, Colorado this 30th day of May, 1986.

/s/ John L. Kane Jr.
UNITED STATES DISTRICT
JUDGE

¹ Colo. Rev. Stat. § 16-13-303(3)(a)-(c) provides:

(3) The following shall be deemed class 1 public nuisances and be subject to forfeiture and distributed as provided in section 16-13-311(3), and no property rights shall exist in them:

(a) All currency, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for any of the acts listed in subsection (1) of this section; or

(b) All proceeds traceable to the unlawful activities listed in subsection (1) of this section; or

(c) All currency, negotiable instruments, and securities used or intended to be used to facilitate any of the violations listed in subsection (1) of this section.

Section 16-13-303(1)(c) lists the unlawful sale or distribution of controlled substances as one of the acts to which forfeiture applies.

² Many of Eggleston's and Albert Levy's claims have been settled, dismissed, or abandoned. The City of Aurora was dismissed from this action on March 18, 1983. *See Eggleston v. State of Colorado*, No. 82-K-2144 (D. Colo. March 18, 1983)(Order of Dismissal). Plaintiffs' claims for civil rights violations were settled and dismissed as against the state on October 24, 1983. Additionally, at oral argument on May 12, 1986, plaintiffs abandoned any remaining civil rights claims. The only claims remaining are for declaratory relief. Plaintiffs seek orders determining the rights of all parties to the *res* and declaring: 1) an evidence of indebtedness, such as a certificate of deposit, is not subject to forfeiture; 2) Colo. Rev. Stat. §§ 16-13-301 *et seq.* are unconstitutional; 3) Levy had a property interest in the monies; 4) this interest was transferred to the trust; 5) the IRS has a beneficial interest in the monies; 6) 21 U.S.C. § 881 is unconstitutional; and 7) forfeiture in this case would constitute an excessive fine in violation of the Eighth Amendment. Because I find that the IRS and the Colorado Department of Revenue are entitled to the *res* in this case, I need not address most of these requests.

³ Congress has provided statutory protections to certain

specifically designated, later perfected creditors competing with federal tax liens which modify the "first in time, first in right" rule. Under 26 U.S.C. § 6323, federal tax liens are invalid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor, but only until notice of the lien is filed in accordance with 26 U.S.C. § 6323 and relevant state law, the tax lien has priority over all claims perfected thereafter.

⁴ Additionally, I question the basis for the Colorado Supreme Court's ruling in *In re Interrogatories*. As will be discussed more fully below, the relation back doctrine applies only to mandatory forfeiture statutes. The Colorado nuisance statutes are permissive in that they state that certain items of property "are subject to seizure, confiscation and forfeiture" See Colo. Rev. Stat. § 16-13-303(2). Thus, the relation back doctrine is not properly applied to forfeitures under the Colorado public nuisance statutes.

⁵ Recently, Congress rectified this failure by enacting 21 U.S.C. § 881(h) which provides: "All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section."

⁶ I find the department took all of the steps required to perfect its liens.

⁷ Colo. Rev. Stat. § 39-22-104(1) states: "A tax determined in accordance with the rates set forth in subsection (2) of this section is imposed for each taxable year on the Colorado taxable income of every individual, estate, and trust." Taxable income, as an undefined term, has the same meaning as used in the federal tax code. Colo. Rev. Stat. § 39-22-103(13). Under federal law, taxable income is derived from gross income which means "all income from whatever source derived" 26 U.S.C. § 61(a); see also 26 U.S.C. §§ 62-64.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, et al.,
Plaintiffs-Appellants,

v.

\$1,508,440.00 IN UNITED STATES CURRENCY, etc., et al.,
Defendants-Appellees.

ORDER

(Filed Aug 2, 1989)

Before HOLLOWAY, Chief Judge, SETH, McKAY,
LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA,
BALDOCK, BRORBY and EBEL, Circuit Judges, and SAF-
FELS, District Judge*

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by the Colorado Department of Revenue in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the Panel that rendered the decision sought to be reheard.

*Honorable Dale E. Saffels, United States District Judge for the District of Kansas, sitting by designation.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all the judges of the court in regular active service. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

/s/ Robert L. Hoecker

ROBERT L. HOECKER, Clerk

APPENDIX D
IN THE
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
Case No. 86-2151 and 86-2192

UNITED STATES	)	Appeal from the
OF AMERICA,	)	United States District Court
	)	for the
Plaintiff-Appellant,	)	District of Colorado
	)	Case: 82-B-2144
v.	)	(Consolidated with
\$1,508,440.00 IN UNITED	)	82-B2228 and
STATES CURRENCY, et al.,	)	83-B-403)
)	
Defendants-Appellees.)	

Reassigned to
Honorable
LEWIS T. BABCOCK
Judge

NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES

(Filed Aug. 17, 1989)

NOTICE IS HEREBY GIVEN that Department of Revenue, State of Colorado, the Defendants-Cross Appellees, hereby appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Tenth Circuit entered in this action on August 2, 1989.

This appeal is taken pursuant to 28 USC § 1251(b)(2) and 1254(1).

FOR THE ATTORNEY GENERAL

/s/ Larry A. Williams
Larry A. Williams, 11088
First Assistant Attorney General
General Legal Services Section
Attorneys for Defendants-Cross
Appellees
1525 Sherman Street, 3d Floor
Denver, Colorado 80203
Telephone: 866-5364

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado this 17th day of August 1989, addressed as follows:

Michael J. Norton
Attn: F. Joseph Mackey, III
United States Attorney's Office
1961 Stout Street, Ste. 1200
Denver, CO 80294

Robert L. Hoecker
Clerk
United States Court of Appeals
Tenth Circuit
United States Courthouse
Denver, Colorado 80204

James R. Manspeaker
Clerk

United States District Court
for the District of Colorado
1929 Stout Street
C-145 U.S. Courthouse
Denver, Colorado 80294

/s/ Ann M. Aragon

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 82-K-2144

PETER M. EGGLESTON, et al.,

Plaintiffs,

v.

THE STATE OF COLORADO, et al.,

Defendants.

THIRD AMENDED PRE-TRIAL ORDER

(Filed Nov. 22, 1985)

I. DATE AND APPEARANCES

Pretrial Conferences held September 23, 1985 and October 24, 1985. Appearances for the parties are:

Mr. Larry Williams for the State of Colorado Department of Revenue

Mr. Jim Peters and Mr. Jim Sell for the State of Colorado

Mr. Joseph St. Veltri for Albert Levy

Mr. F. Joseph Mackey and Mr. Ben DeLuna for the United States

Mr. Jan Zavislan for Jefferson Bank & Trust

Mr. Michael Abramovitz and Ms. Nina Iwashko for
Peter M. Eggleston and the Albert C. Levy Irrevocable
Trust

Mr. E. Hil Margolin for the City of Lakewood

Mr. Frank Martinez for Victoria Levy

II. JURISDICTION

Plaintiffs Eggleston and Levy assert in their complaint that jurisdiction is based on 28 U.S.C. § 1331, 42 U.S.C. §§ 1982, 1983, 1985.

The United States asserts in its original complaints for forfeiture that jurisdiction is based upon 28 U.S.C. §§ 1345 and 1355. In its amended complaint, which asserts an alternative claim based upon the IRS levy, the U.S. states that jurisdiction is based upon 28 U.S.C. §§ 1340, 1345, and § 720(a) of the Internal Revenue Code of 1954.

The State of Colorado contests jurisdiction over its public nuisance forfeiture action. The State of Colorado frames the issues as follows:

- (a) Does the Eggleston suit against the State of Colorado give the federal court jurisdiction over the State of Colorado's public nuisance forfeiture action against the *res*?
- (b) Does the State of Colorado's assertion of a claim against the *res* in federal court give the federal court jurisdiction over the State of Colorado's public nuisance forfeiture action?

The State of Colorado also questions jurisdiction over the *res* and the propriety of enjoining the state from

proceeding on its public nuisance forfeiture action in state court:

(a) Did the federal court properly seize the *res* from the Arapahoe County District Court on March 25, 1983, where . . . the *res* was transferred from the [Lakewood Department of Public Safety] to the custody of the Arapahoe County District Court by order of Colorado State District Judge Thomas Levi on December 16, 1982?

(b) Did the federal court properly enjoin the State of Colorado from proceeding on its public nuisance forfeiture action in state court where the *res* was . . . transferred into the custody of the Arapahoe County District Court pending the outcome of the public nuisance forfeiture action filed in that state court?

On July 28, 1984, this court issued an order denying the State of Colorado's motion to be dismissed. The state had asserted that it should only defend in state court where the nuisance action was pending. In that order, this court stayed the State of Colorado from prosecuting its nuisance/forfeiture claim in the pending state proceeding.

III. CLAIMS AND DEFENSES

Each of the parties claim entitlement to all or part of the monies seized. Each seeks an adjudication of the respective priorities of the parties to the monies. Plaintiffs Eggleston and Levy also assert claims for deprivation of Levy's constitutional rights against the governmental entities and agencies involved.

A. Eggleston and Levy

In their supplemental and amended complaint, Eggleston and Levy make the following claims for relief and seek orders:

1. that evidences of indebtedness, such as certificates of deposit, are not subject to forfeiture under 21 U.S.C. § 881.

2. that Colo.Rev.Stat. § 16-13-303(3) is unconstitutional; that Levy had property interests in the monies seized; and that Levy effectively transferred these interests to the Trust.

3. that Colo.Rev. Stat. § 16-13-301 et seq. is unconstitutional.

4. that the IRS has a beneficial interest in the monies assigned to the Trust.

5. that the search and seizure of the monies was illegal; that the monies be returned to the plaintiffs; that the monies be held inadmissible for any purpose in any action; that Levy's constitutional rights were violated (this count was dismissed as against the State of Colorado).

6. that 21 U.S.C. § 881 is unconstitutional.

7. that defendants' actions were unconstitutional, depriving plaintiffs of their civil rights (this count was dismissed as against the State of Colorado).

8. determination of the parties' priorities.

In Eggleston's statement of facts and claims, Eggleston further claims that:

9. the U.S. failed to follow procedural requirements in instituting its § 881 forfeiture action.

10. the government's complaint fails to state a claim for forfeiture because

(a) the complaint fails to describe the property,

(b) the complaint fails to state that the property is within the district or will be within the district during the pendency of the litigation,

(c) the complaint is styled in conclusory language in violation of both Fed.R.Civ.P. 8(a) and Supplemental Rule E(2)(a),

(d) the Lakewood Department of Public Safety, rather than any federal law enforcement personnel, seized the monies. A forfeiture under § 881 must follow a seizure of the property by U.S. law enforcement officers,

(e) the Supplemental Rules do not allow the appointment of a "substitute custodian", as was done here. No Summons issued in this case, as required by Supplemental Rule C(3). Additionally, neither the seized funds nor the certificates of deposit were seized or paid into court. Also, there was no attempt to comply with the procedural requirements of 21 U.S.C. § 881(c) regarding disposition of the property,

(f) any interest accrued since the date of seizure is not subject to forfeiture because the forfeiture statute does not so provide.

11. the trust property is not forfeitable under § 881 because any acts allegedly giving rise to forfeiture were not committed or omitted with the knowledge or consent of the Trustee.

12. because the language of § 881 is permissive rather than mandatory, the government may not rely on the doctrine of "relation back" to destroy assignments or transfers made prior to the date of the forfeiture action.

13. any interest which has accrued on the monies is not subject to forfeiture.

14. the search of the Levy residence was unlawful, based on an illegal warrant, and outside the scope of the warrant.

15. the various governmental agencies and entities should be precluded from recovering the monies because of their bad faith, harrassment, and duplicative yet inconsistent actions.

16. the *res* was not properly subject to forfeiture pursuant to § 881 in that the *res* was the result of activities occurring prior to November 1978 and, in conjunction with the doctrine of "relation back", there was no statutory authority for the seizure of U.S. currency since subsection (a)(6) did not become effective until November 1978 or six months thereafter.

B. Colorado Department of Revenue

The Colorado Department of Revenue claims that its rights are superior to any other claim to the extent of its interest in the \$1.5 million. The department asserts the following claims against the Trust and Levy: \$115,880.12

in Colorado sales tax for 1982, \$19,313.39 in RTD tax, and \$58,677 in Colorado income tax for 1982, based upon total narcotics sales of \$2,980,688 for that year. The department argues that it has priority because the taxes due are incurred at the moment of the sales transactions and must be remitted to the state. Once the taxable transaction occurs, the monies constituting the tax become property of the State of Colorado.

C. United States

1. D.E.A. Claims

The United States claims that the monies are proceeds traceable to exchanges for a controlled substance and as such, the monies forfeit to the United States under 21 U.S.C. § 881 and no other property right exists in such monies. The government claims that it is also entitled to accrued interest under § 881.

2. I.R.S. Claims

In its amended complaint for forfeiture, the government also asserts a claim under § 7402 of the Internal Revenue Code to enforce the IRS levy on the monies seized. The government claims that this levy takes priority over all claims except that for forfeiture under 21 U.S.C. § 881. The IRS made a termination assessment against Levy on January 5, 1983 for \$1,962,563.

Alternatively, the government argues that if the monies are not forfeit to the U.S. and not delivered to the U.S. pursuant to Count II (the IRS levy), then the federal tax lien attached to Levy's rights in the monies and

should be applied to the outstanding assessment amount of \$1,962,563, plus accruing interest and penalties.

The conflict of interest between the D.E.A. and the I.R.S. has been noted by the court.

D. JB&T

JB&T asserts that it obtained valid pre-judgment writs of attachment and garnishment which served to create a lien on the seized monies in JB&T's favor. Judgment was entered against Levy in favor of JB&T in the amount of \$373,243.76 plus statutory interest. Levy assigned any interest he had in the Trust to JB&T. By virtue of this assignment, JB&T's claims to the proceeds in this case are derivative of the claims of Levy and the Trust.

JB&T claims that it has a priority position with respect to the subject property by virtue of its pre-judgment writs of attachment and garnishment, to which no objections were ever filed, and, in addition, a derivative claim to said property by virtue of its judgment against Levy and the subsequent assignment of interest from Levy. Finally, on equitable grounds, JB&T claims that it is entitled to a portion of said property by virtue of the fact that it is an innocent third party with a valid and good faith claim against the property of Albert Levy and the Albert C. Levy Irrevocable Trust which interest predates that of any other party hereto.

E. State of Colorado

The State of Colorado claims that it is entitled to the monies under the Colorado Nuisance Statutes which require forfeiture of currency under the circumstances of

this case. The State argues that the currency becomes forfeitable when it is used, intended or attempted to be used in violation of law and that the governmental interest arises at the time the object is used or generated in violation of law. Thus, the state argues, the monies at issue here had been seized and escheated to the state before the filing or any levies or actions by any other governmental agency.

F. City of Lakewood

The City of Lakewood makes the same claims to the monies as the State of Colorado. The city also asserts that plaintiffs' claims for alleged torts committed by the city are barred by plaintiffs' failure to give notice under the Colorado Governmental Immunity Act and that plaintiffs' allegations of constitutional rights violations by the city are deficient in that they fail to describe any link between the alleged deprivation of rights and the official policy, custom or usage by the city.

G. Victoria Levy

Victoria Levy asserts, as an equitable matter, that the funds should be used to retire federal and/or state tax obligations. Once this is done, Victoria Levy claims she is entitled to any balance because no notice of forfeiture was served on her by the DEA and no personal tax assessments have been asserted against her.

IV.A. STIPULATED FACTS

1. November 25, 1981: Lakewood Police Officer Worsham stopped a Porsche on West Colfax for a traffic

violation. Officer Worsham arrested the occupants, Douglas Keiser and Carlos Smith for possession of cocaine found in the car. While processing the detainees at the police station, Officer Shupe copied the contents of an address book found in their possession. The copies were given to Agent LaBelle who ran checks on the names listed. Agent LaBelle discovered that several of those persons listed had been arrested or convicted of drug-related offenses.

2. May 1982: Smith agreed to become an informant for Agent LaBelle.

3. June 1982: Based on information provided by Smith, the Jefferson County Court authorized the use of pen register devices on Lawrence Levy's (son of Victoria and Albert Levy) home telephones. The information from the pen registers, coupled with that obtained through examination of the telephone toll records, led agents to information which was used in affidavits in support of the application for wiretaps.

4. November 16, 1982: Listening devices were placed in Albert and Victoria Levy's home pursuant to an Arapahoe County District Court order.

5. November 20, 1982: Based upon information gathered by these wiretaps, Lakewood police obtained a search warrant for the Levy home.

6. November 21, 1982: Lakewood police searched the home of Albert and Victoria Levy at 13966 East Radcliff Drive, Arapahoe County, Colorado, and seized from the home approximately \$1.5 million in currency from a safe and a suitcase and 12 gold bars. Albert and Victoria Levy were arrested.

7. December 1, 1982: Albert Levy transferred his interest in the monies seized to an irrevocable trust administered by plaintiff Peter Eggleston. The principal beneficiary of this trust is the IRS.
8. December 2, 1982: The State of Colorado commenced a nuisance action in the Arapahoe County District Court, pursuant to Colo. Rev.Stat. §§ 16-13-303(1)(c), 16-13-303(3)(a), (b), and (c) for forfeiture of the monies.
9. December 6, 1982: Plaintiff Jefferson Bank & Trust (JB&T) brought an action against Levy, who had been an unsecured debtor of JB&T since 1979, in Arapahoe County. JB&T obtained and served a pre-judgment writ of attachment on the sheriffs of Arapahoe, Jefferson, and Denver Counties, seeking to attach the seized monies. JB&T also served a pre-judgment writ of garnishment upon the Lakewood Department of Public Safety, sheriffs of Arapahoe and Jefferson Counties, and the DEA.
10. December 15, 1982: Plaintiffs Eggleston and Levy filed a complaint and motion for TRO in the federal district court (No. 82-K-2144).
11. December 16, 1982: The Arapahoe County District Court judge presiding over the state nuisance proceeding ordered that the Lakewood Department of Public Safety give custody of the seized monies to the court clerk. The monies were deposited in the United Bank of Littleton and certificates of deposit were issued to Eileen Manning, Clerk of the Arapahoe County District Court. The transcript of the proceedings in the Arapahoe County District Court on December 16, 1982 are incorporated herein and shall control.
12. December 16, 1982: DEA Special Agent Richard Barrett filed a forfeiture initiation report.

13. December 22, 1982: The Colorado Department of Revenue, pursuant to Colo. Rev. Stat. § 39-26-118(2)(a), prepared a sales tax assessment; pursuant to Colo. Rev. Stat. § 39-22-602, prepared an income tax assessment; pursuant to Colo. Rev. Stat. § 39-2-120(2)(a) and 39-26-118(2), prepared an RTD sales tax assessment against Levy.

14. December 22, 1982: The Colorado Department of Revenue issued jeopardy assessments with regard to the above-referenced taxes pursuant to Colo. Rev. Stat. § 39-21-111 and warrants for distraint pursuant to Colo. Rev. Stat. § 39-21-114.

15. December 23, 1982: A Notice of Lien for state taxes was filed with the Clerk and Recorder of Arapahoe County and recorded on December 30, 1982 in Book 3765 page 358. In addition, an agent of the Colorado Department of Revenue, pursuant to Colo. Rev. Stat. § 39-21-114(3), filed a Warrant for Distraint with the Clerk of the Arapahoe County District Court, who entered it into the judgment docket. The clerk then issued a Transcript of Judgment Docket which was sent to the Clerk and Recorder in Arapahoe County. The Colorado Department of Revenue then served Notices of Tax Lien and Garnishment under Distraint for Collection, upon the Arapahoe County District Court Clerk.

16. Judgment in favor of the Colorado Department of Revenue was entered on December 23, 1982 as follows:

- A. Colorado Sales Tax \$115,880.12
Recorded in Book 3792, page 66, on
February 8, 1983, at 11:25 a.m.
- B. RTD Sales Tax \$19,313.39
Recorded in Book 3792, page 65, on
February 8, 1983, at 11:25 a.m.

C. Income Tax \$58,677.00

Recorded in Book 3792, page 67, on
February 8, 1983, at 11:25 a.m.

17. The assessments for sales tax, RTD sales tax and income tax remain unpaid.

18. December 23, 1982: The United States filed a complaint in the federal district court for forfeiture of the monies (No. 82-K-2228). The United States also applied to the U.S. District Court Clerk for a warrant for the arrest of the currency and the warrant was duly issued on January 3, 1983.

19. January 3, 1983: Judge Carrigan appointed Eileen Manning as substitute custodian for the currency. [Re: U.S. Currency] Warrant for arrest of article in rem issued; order for warrant of arrest of property and for notice issued - Marshal ordered to arrest; Marshal ordered to transfer custody from himself to substitute custodian designated by separate order; publication of notice ordered; complaint and warrant of arrest of article in rem ordered to be served on Clerk of Arapahoe County District Court.

20. January 4, 1983: [Re: U.S. Currency] Notice of arrest and seizure by U.S. Marshal issued; process receipt and return by U.S. Marshal issued to Arapahoe County District Court; receipt issued by United Bank of Littleton to U.S. Marshal for storage of currency.

21. January 5, 1983: The IRS terminated Albert C. Levy's taxable period (January 1, 1982 to November 30, 1982) and assessed a tax liability of \$1,962,563.00. The IRS served a Notice of Levy on the Arapahoe County District Court Clerk requesting all property and rights to property of Albert C. Levy in order to satisfy the outstanding assessment of \$1,962,563 for the tax period ended November 30, 1982.

22. January 11, 18, 25, 1983: [Re: U.S. Currency] Notice of arrest and seizure published in the Rocky Mountain News.
23. January 14, 1983: The state nuisance action was dismissed but the State of Colorado refiled on January 26, 1983.
24. January 24, 1983: Notices of federal tax lien asserting the \$1,962,563 was filed with the Clerk and Recorder of Pitkin County in Aspen, Colorado 81611 and with the Clerk and Recorder of Jefferson County in Golden, Colorado 80401.
25. January 25, 1983: Notice of federal tax lien asserting the \$1,962,563 was filed with the Clerk and Recorder of Arapahoe County in Littleton, Colorado 80120.
26. March 11, 1983: The United States filed a complaint for forfeiture of the gold (No. 83-K-403).
27. March 14, 1983: [Re: Gold Bars] Warrant for arrest of article in rem issued.
28. March 15, 1983: This court entered a judgment in favor of the United States sustaining the IRS's termination assessment. The assessment of \$1,962,563 for the taxable period ended November 30, 1982 remains unpaid.
29. March 22, 1983: Status conference. The IRS was appointed as receiver of the monies and the cases were consolidated.
30. March 24, 1983: The Internal Revenue Service served a Notice of Final Demand on the Clerk of Arapahoe County District Court requesting all property and rights to property of Albert C. Levy in order to satisfy the outstanding assessment of \$1,962,563 for the tax period ended November 30, 1982.

31. March 25, 1983: [Re: U.S. Currency] Order issued appointing U.S. District Court Clerk as superseding custodian; Arapahoe County District Court Clerk tendered certificate of deposit to U.S. Marshal.

32. April 4, 1983: [Re: U.S. Currency] U.S. Marshal took custody of certificate of deposit from Clerk of the Arapahoe County District Court.

33. April 5, 1983: [Re: U.S. Currency] U.S. Marshal relinquished custody of certificate of deposit to James Manspeaker, Clerk of the U.S. District Court.

34. April 6, 1983: [Re: U.S. Currency] Order issued for renewal of certificate of deposit (amending order of March 25, 1983); U.S. Marshal tendered certificate of deposit to Clerk of the U.S. District Court for the District of Colorado.

35. April 6, 1983: [Re: Gold Bars] Arrest of Twelve Gold Bars by U.S. Marshal; Process Receipt and Return by U.S. Marshal issued to Drug Enforcement Administration; Seized Property and Evidence Control issued by U.S. Marshal.

36. April 7, 1983: [Re: U.S. Currency] Clerk of the U.S. District Court acknowledged receipt of certificate of deposit; seized property and evidence control issued by U.S. Marshal.

37. May 13, 17, 20, 1983: [Re: Gold Bars] Notice of Arrest and seizure published in the Rocky Mountain News.

38. January 26, 1984: Levy plead guilty before Judge Matsch to one count of 18 U.S.C. § 371, conspiracy to defraud the U.S. by evading and defeating the collection of taxes by the IRS for income derived from the illegal distribution of cocaine.

39. February 9, 1984: Criminal charges against Victoria Levy were dismissed.

40. April 3, 1984: A stipulation, confession of judgment and order of judgment was entered in the Arapahoe County District Court in favor of JB&T in the amount of \$373,243.76 plus interest. Levy assigned to JB&T, to the extent of the judgment, his interest in the trust.

41. May 29, 1984: State nuisance action in the Arapahoe County District Court dismissed upon motions by Albert and Victoria Levy.

42. The property originally seized in this case constituted \$1,508,440.00 in United States currency (plus any increase in value through investment) and twelve gold bars.

43. The *res* was seized within the District of Colorado and will be within the district during the pendency of the litigation.

44. The U.S. currency and gold bars were the products of an illegal exchange for purchase of an illegal substance, to wit: cocaine, and were intended to be used as payment for cocaine previously purchased. The "exchanges of controlled substances" referred to in the pleadings occurred during the calendar years 1981 and 1982.

45. All state actions relating to the *res* have been dismissed.

IV.B. CONTESTED FACTS

There are no contested issues of fact.

V. PENDING MOTIONS

There are no pending motions. All issues and claims are merged into this pre-trial order.

VI. WITNESSES

No witnesses are to be called. This case will be tried on stipulated facts and exhibits.

VII. EXHIBITS

This is a trial to the court. With the exception of objections as to relevancy, the following list contains all exhibits to be admitted and all are stipulated to be authentic.

A. United States

1. Albert Levy, Prosecutor's Statement
2. Albert Cohen, Prosecutor's Statement
3. David Thomas, Prosecutor's Statement
4. David Ziemer, Prosecutor's Statement
5. Rick Albert, Prosecutor's Statement
6. Frank Ficarra, Prosecutor's Statement
7. D.C. McClary, Special Agent, DEA, Report of seizure of 12 one ounce gold bars from Albert Levy
8. Richard Barrett, Special Agent, DEA, Report of forfeiture initiation
9. Memorandum opinion and order by Judge Matsch, dated October 28, 1983 as to legality of seizure

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10. Certificate of Assessments and Payments, Form 4340, for Albert Levy, setting forth the termination assessment of \$1,962,563
11. A copy of Notice of Levy, Form 668-A, which was served on the Clerk of Arapahoe County District Court on January 5, 1983
12. A copy of Notice of Federal tax Lien, Form 668(c), dated January 19, 1983 and filed with the Clerk and Recorder, Pitkin County, Aspen, Colorado 81611 on January 24, 1983
13. A copy of Notice of Federal Tax Lien, Form 668(c), dated January 19, 1983 and filed with the Clerk and Recorder, Jefferson County, Golden, Colorado 80401 on January 24, 1983.
14. A copy of Notice of Federal Tax Lien, Form 668(c), dated January 19, 1983, and filed with the Clerk and Recorder, Arapahoe County, Littleton, Colorado 80120 on January 25, 1983.
15. A copy of this Court's Judgment filed March 15, 1983 sustaining the Internal Revenue Service's termination assessment.
16. A copy of Form 668-C, Final Demand, which was served on the Clerk of Arapahoe County District Court on March 24, 1983.

B. JB&T

1. Copy of Stipulation, Confession of Judgment, and Order of Judgment between Albert Levy and JB&T
2. To the extent necessary, the entire court file in the state action by JB&T against Levy

C: Lakewood

No additional exhibits. The city utilizes exhibits submitted by other parties.

D. State of Colorado

1. Albert Levy, Prosecutor's Statement
2. Tapes and transcripts of oral communications intercepted at Continental Lighting Company.
3. The recorded and transcribed conversation between Albert and Victoria Levy on November 20, 1982.
4. The taped and transcribed telephone conversation between Albert and Larry Levy on September 21, 1982.
5. Transcript of proceedings, Arapahoe County District Court, December 16, 1982.

E. Victoria Levy

none

F. Colorado Department of Revenue

1. Notices of jeopardy assessment and demand for immediate payment of Colorado income, sales and RTD tax
2. Warrants for distraint for the personal property of Albert Levy
3. Transcripts of final judgment from Arapahoe County District court against Levy for Colorado income, sales, and RTD tax.
4. Notice of lien and garnishment under distraint for collection of delinquent taxes

served on the Arapahoe County District Court Clerk.

5. The Albert C. Levy Irrevocable Trust.
6. Notice of lien for state taxes dated December 23, 1982.

G. Albert Levy

none

Copies of exhibits must be provided to opposing counsel.

VIII. DISCOVERY

Discovery is completed.

IX. SPECIAL ISSUES (OF LAW)

A. State of Colorado

1. Does the federal court have jurisdiction over the State of Colorado's public nuisance forfeiture action which was filed originally in the Arapahoe District Court?

(a) Does the Eggleston suit against the state give the federal court jurisdiction over the state's public nuisance forfeiture action against the *res*?

(b) Does the state's assertion of a claim against the *res* in federal court give the court jurisdiction over the state's public nuisance forfeiture action?

2.(a) Did the federal court properly seize the *res* from the Arapahoe County District Court?

(b) Did the federal court properly enjoin the state from proceeding on its public nuisance forfeiture action in state court?

3. The constitutionality of C.R.S. §§ 16-13-303 (1)(c) and 16-13-303(a), (b), and (c).

4. The validity of the purported assignment by Levy of his alleged interest in the *res* to the trust.

5. The priority of the various claims to the *res*.

B. United States

1. Whether forfeiture prevails over all other competing claims.

2. Whether forfeiture is superior to a tax claim.

3. Whether the *res* was legally seized. If not, is it still subject to forfeiture?

4. Who has a claim to the accrued interest?

5. Does a transfer of the funds to the "Trust" defeat the government's claim?

C. JB&T

1. Whether Levy had a property interest to convey to the Trust after the property had been seized by law enforcement officials.

2. Whether Levy could assign a beneficial interest in that trust to JB&T after the seizure of the corpus of that trust and after the commencement of the U.S. forfeiture action.

3. Whether the assignee of a beneficial interest in a trust, the corpus of which has been seized in connection with an alleged drug trafficking investigation, has standing to challenge the seizure or forfeiture of that property.

D. Victoria Levy

1. Do Fourth Amendment protections apply to this case? If so then

(a) were the initial pen registers obtained without sufficient affidavits to meet the Colorado state law test and thus all evidence obtained thereafter suppressible?

(b) were the oral intercept affidavits insufficient?

(c) was the affidavit for the search of the Levy home sufficient?

(d) was the government required to obtain separate warrants for either the safe or briefcase, wherein the funds were found?

2. Did the government violate Levy's 5th Amendment rights in obtaining information and does that affect this case?

3. Can the government utilize the wiretaps, which have been ruled to be the subject of grand jury secrecy, in trying to establish their burden in this case?

4. Given the circumstances of the "arrest" of the funds, was probable cause required to be demonstrated to a person in authority to review the facts and make an

independent determination? If so, does the failure of that defeat the entire government forfeiture action?

5. Can and should this court, sitting under the Rules of Admiralty, by equity order that the funds seized be used to retire the federal and/or state obligations and the balance, if any, be returned to Victoria Levy against whom no notice of forfeiture was served by the DEA, against whom all criminal charges were dismissed, and against whom no personal tax assessments have been placed?

6. Claimants' priority.

7. Whether Victoria Levy has standing in this case.

E. Albert Levy

1. Whether the evidence to be used by the United States to establish its burden of proof in this case flows from unlawful investigative techniques (i.e. use of pen registers), and may not be utilized in this case.

2. Whether unlawfully disclosed wiretap and oral intercept information can be used to establish the government's burden of proof in this case.

3. Whether the failure of the government to establish probable cause to obtain a warrant for arrest of the property, as required in forfeiture actions, defeats its claim.

4. The consequences, if any, of the government's violation of Fed.R.Crim.P. 6(e).

5. The consequences, if any, of the adoption by Congress in October 1984 of the doctrine of relation back in conjunction with passage of § 881(a)(6) in November 1978.

F. City of Lakewood

1. Whether plaintiffs' claims for monetary recovery for injury from alleged torts committed by the city are barred by plaintiffs' failure to give notice under the Colorado Governmental Immunity Act.

2. Whether plaintiffs' allegations of constitutional rights violations are deficient in that they fail to describe any link between the alleged deprivation of rights and the official policy, custom, or usage by the city.

3. Whether plaintiffs' allegations of constitutional rights violations against the city are based solely upon the doctrine of respondeat superior and are, therefore, insufficient to state a claim against the city.

G. Colorado Department of Revenue

1. Whether the creation of the trust abrogates the state's rights to the monies.

2. Claimants' entitlement and priority.

X. OFFER OF JUDGMENT

Counsel acknowledge familiarity with the provisions of Fed.R.Civ.P. 68 (Offer of Judgment) and have discussed it with the clients against whom claims are made in this case.

XI. EFFECT OF PRETRIAL ORDER

The orders of May 14, 1985 and July 28, 1984 are incorporated into this pre-trial order and annexed to it as exhibits A and B.

(a) Counsel acknowledge familiarity with the provisions of Fed.R.Civ.P. 16 (Pre-Trial procedure; formulating issues).

(b) Hereafter, this order will control the subsequent course of this action and the trial and may not be amended except by consent of the parties and approval by the court or by order of the court to prevent manifest injustice. The pleadings will be deemed merged herein. In the event of ambiguity in any provision of this order, reference may be made to the records of the pre-trial conference to the extent reported by stenographic notes and to the pleadings.

XII. TRIAL:

(a) Trial is on the briefs with oral argument.

(b) *Briefing Schedule*

(1) Plaintiffs' opening brief is due December 18, 1985.

(2) Defendants' brief is due February 15, 1986.

(3) Plaintiffs' reply is due March 15, 1986.

(c) *Oral Argument*

Oral argument will be held on May 12, 1986 in Courtroom 200, United States Courthouse, Denver, Colorado beginning at 9:00 a.m.

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DATED at Denver, Colorado this 22 day of November,
1985.

BY THE COURT:

/s/ John L. Kane Jr.
UNITED STATES DISTRICT JUDGE
